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FEDERAL ANTI-TRUST DECISIONS

CASES DECIDED IN UNITED STATES COURTS

**ARISING UNDER, INVOLVING, OR GROWING
OUT OF THE ENFORCEMENT OF**

THE FEDERAL ANTI-TRUST ACTS

(Act of July 2, 1890; 26 Stat., 209)

(Act of Aug. 27, 1894; 28 Stat., 570)

(Act of Feb. 12, 1913; 37 Stat., 667)

(Act of Oct. 15, 1914; 38 Stat., 780)



**INCLUDING A FEW SOMEWHAT SIMILAR DECISIONS
NOT BASED UPON THOSE ACTS**

1890-1917

COMPILED BY

JOHN L. LOTT

AND

ROGER SHALE

UNDER THE DIRECTION OF THE ATTORNEY GENERAL

VOL. 5

**WASHINGTON
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1917**

Statement of the Case.

twenty years last past, inventors and manufacturers have been busy inventing, producing, and putting upon the market divers record-keeping and cash-receptacle devices, usually called cash registers, each consisting generally of a box, principally of metal, but partly of wood, glass, or other materials, containing a drawer or recess for the holding of coins and paper money, and a mechanism, manipulated by outside keys or similar means, for the use of employes in registering, for the information of the proprietor, upon a concealed and locked record, the sales made by employes of the business concern making use of the device, and at the same time visibly indicating the amount of each sale or the character of each transaction; the recording or registering devices being so connected with the lock of the money-drawer that when any of said devices is operated the money-drawer is unlocked and opened, so that money can be placed therein and change extracted therefrom; said money-drawer being automatically locked upon being closed, and the interior mechanism of said registering device being protected by a lock, the key of which is retained by the proprietor, from being interfered with by unauthorized persons; numerous patents having, during said twenty years, been issued to inventors, some basic and some for improvements; most of the former and many of the latter having expired long before the three-year period of time in this indictment hereafter mentioned; and the number of such patents being so great as to prevent the setting forth in this indictment of detailed descriptions of the same, or of the various inventions covered by them, even if such descriptions were known to said grand jurors:

That such cash registers have been found so useful and the demand for them has been so great that, during said twenty years, many concerns have been engaged, in the manner and under the circumstances in this indictment hereafter set forth and in competition with each other, except as hereinafter shown, in the manufacture and sale, directly and indirectly under letters patent, and otherwise, of such cash registers; and that a list of the names of such of said concerns as are known to said grand jurors, showing their respective places of manufacture, so far as known to said grand jurors, is as follows, to wit: The National Cash Register Company, a corporation, Dayton, Ohio. [Then follow names of 32 other companies.]

That of the total amount of manufacturing of such cash registers done by all of said concerns during said twenty years, said the National Cash Register Company has done from approximately eighty per cent early in said period to approximately ninety-five per cent at the latter end thereof.

That said concerns, during said twenty years, have also respectively sold the greater portion of the cash registers so manufactured by them, some to users of and some to dealers in such cash registers, whose several places of use and business have been situated in all the other States of the United States than those wherein such cash registers have been so manufactured by said concerns respectively,

Statement of the Case.

cash register to which it was similar, such manufacture of such "knocker" by said the National Cash Register Company being discontinued when it was no longer useful as a "knocker"; by exhibiting and offering for sale, to other prospective purchasers of cash registers, cash registers in similitude of any particular cash register any such prospective purchaser was contemplating buying, and this at a price in all cases much lower than the regular price of such competitive cash register and in some cases at a price much less than the manufacturer's cost of such competitive cash register, which cash register so exhibited and offered for sale to such prospective purchaser as last aforesaid was in each case one manufactured by said the National Cash Register Company in such close similitude of the competitive cash register in question as to enable the sales agent of said the National Cash Register Company to represent to such prospective purchaser, and impel such prospective purchaser to believe, as was often done, it to be a counterpart thereof, when in fact it was a cash register having weak and defective interior mechanism and parts, and one manufactured by said the National Cash Register Company, with such weak and defective mechanism and parts, solely as a so-called "knocker," and for the very purpose of being so exhibited and offered for sale and enabling its sales agents to exhibit to such prospective purchaser such weak and defective mechanism and parts, and falsely claim that the competitive cash register to which it was similar had the same weak and defective mechanism and parts as an argument against his purchasing any such cash register and one in favor of his pur- [708] chasing a genuine but more expensive cash register manufactured by said the National Cash Register Company, and at any rate for the purpose of shortly bringing about a sale of such genuine cash register to such purchaser, in case he insisted on purchasing such "knocker," through the failure of such "knocker" to operate, and for no other purposes, such manufacture of such last-mentioned "knocker" by said the National Cash Register Company being also discontinued when it was no longer useful as a "knocker"; and, finally, by instructing and requiring sales agents of said the National Cash Register Company, and persons employed for that purpose by that company, secretly to weaken and injure the interior mechanism, and remove and destroy parts of such mechanism, of such competitors' cash registers in actual use by purchasers as they could by any means get their hands upon, and this for the purpose of causing, as in many cases it actually did cause, persons who had purchased such competitive cash registers to become dissatisfied with them and substitute for them genuine cash registers manufactured by said the National Cash Register Company;

6. The making, in some cases, by said the National Cash Register Company, to such competitors, and to purchasers and prospective purchasers of such competitive cash registers, of threats to begin suits in the courts against them for infringing and for having infringed its patent rights pertaining to its genuine cash registers, when

Statement of the Case.

fully, wrongfully, and irresistibly excluding other concerns beside said the National Cash Register Company from engaging in said interstate trade and commerce, as might at any time become, or appear to said defendants or agents or sales agents to be, necessary or convenient (consideration being had for the exigencies of said interstate trade and commerce arising from its being carried on between widely separated places under many differences of condition and demand) for engaging in and accomplishing the above-described objects of said unlawful conspiracy; a description of which said means last aforesaid, other than they were similar in character to the means hereinabove described, said grand jurors are unable to set forth in this indictment, because, as they charge the fact to be, such means were so numerous in kind and so shifting in character as to make such description impossible.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that said John H. Patterson, Edward A. Deeds, George C. Edgeter, William F. Bippus, William H. Muzzy, William Pfum, Alfred A. Thomas, Robert Patterson, Thomas J. Watson, Joseph E. Rogers, Alexander C. Harned, Frederick S. High, Pliny Eves, Arthur A. Wentz, George E. Morgan, Charles T. Walmsley, Charles A. Snyder, Walter Cool, Myer N. Jacobs, Mont. L. Lasley, Earl B. Wilson, Jonathan B. Hayward, Alexander W. Sinclair, John J. Range, and Edgar Park, alias C. D. Foote, and M. G. Keith, W. M. Cummings, J. C. Laird, W. C. Howe, and E. H. Epperson, during the three years next preceding the finding and presentation of this indictment, at and within said Western Division of said Southern District of Ohio, in manner and form in this count of this indictment aforesaid, unlawfully have knowingly engaged and consciously participated in a conspiracy in undue, unreasonable, direct, and oppressive restraint of trade and commerce among the several States in cash registers, and one to restrain, and which has restrained, that trade and commerce by unfair, oppressive, tortious, illegal, and unlawful means, and means which have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said John H. Patterson [and the other defendants named in the first count], at divers times during three years next preceding the finding and presentation of this indictment, at and within said Western Division of said Southern District of Ohio, under the circumstances and conditions, and by use of the means, set forth and described in the first count of this indictment, unlawfully have, by drawing to said the National Cash Register Company and causing that company to grasp it, monopolized a part of the trade and commerce among the several States in cash registers, that

Statement of the Case.

is to say, that part of said trade and commerce which, but for their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner in said first count specified, would, during that period, have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company, mentioned in said first count as having carried on business during said three years; said means being, as in said first count shown and charged, unfair, oppressive, tortious, illegal, and unlawful under said circumstances as against said other concerns, and of a nature, under said circumstances, irresistibly to exclude those concerns from engaging in that trade and commerce; said grand jurors being unable, by reason of the great extent thereof, and because the same are unknown to them, the said grand jurors, to enumerate or describe the items of such trade and commerce in cash registers so monopolized by said defendants; and the allegations of said first count descriptive of such cash registers, of said interstate trade and commerce in the same and the concerns engaged therein, and of the means employed by said defendants to restrain said interstate trade and commerce, and the allegations of said first count as [705] to knowledge, intent, and overt acts on the part of and by said defendants, being by said grand jurors incorporated in this count by reference as fully as if they were repeated in this count as part of the charge of monopolizing in this count made; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRD COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said John H. Patterson [and the other defendants named in the first count], having before the period of three years next preceding the finding and presentation of this indictment, in the manner, by the means, and under the circumstances and conditions, mentioned and described in the first count of this indictment, engaged, as said grand jurors, upon their said oath, here charge they did engage, in the unlawful conspiracy in said first count described, and having, in and by so engaging in that unlawful conspiracy, drawn as said grand jurors, upon their said oath, here charge they did draw, to said the National Cash Register Company, and caused, as said grand jurors, upon their said oath, charge they did cause, said the National Cash Register Company to grasp, a part of the trade and commerce among the several States in cash registers, that is to say, that part of said trade and commerce which, but for their so engaging in that unlawful conspiracy and their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner and under the circumstances in said first count specified, would have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company, mentioned in said first count as having

Opinion of the Court.

carried on business before said period of three years (said means being, as in said first count shown and charged, unfair, oppressive, tortious, illegal, and unlawful, under said circumstances, as against said other concerns, and of a nature, under said circumstances, irresistibly to exclude those concerns from engaging in that trade and commerce), and each of said defendants well knowing all the premises in this indictment aforesaid, unlawfully have, throughout said period of three years next preceding the finding and presentation of this indictment, continued to hold, conduct, and carry on said interstate business of said the National Cash Register Company, so by said means before said period augmented, and thereby have monopolized said interstate trade and commerce in cash registers; said grand jurors being unable, by reason of the great extent thereof, and because the same are unknown to them, the said grand jurors, to enumerate or describe the items of such trade and commerce in cash registers so as in this count aforesaid monopolized by said defendants; and the allegations of said first count descriptive of such cash registers, of said interstate trade and commerce in the same and the concerns engaged therein before said period of three years, and of the means so employed by said defendants to restrain said interstate trade and commerce, and draw to said the National Cash Register Company, and cause that company to grasp, said interstate commerce, and also the allegations of said first count as to knowledge and intent on the part of said defendants, being, by said grand jurors, incorporated in this count by reference as fully as if they were repeated in this count as part of the charge of monopolizing in this count made against said defendants; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Sherman T. McPherson, U. S. Atty., of Cincinnati, Ohio; *Oliver E. Pagan*, of Washington, D. C.; *Edward Moulinier*, Asst. Dist. Atty., of Cincinnati, Ohio; *O. E. Harrison*, Sp. Asst. Atty. Gen., of Columbus, Ohio; and *John L. Lott*, Sp. Asst. Atty. Gen., of Tiffin, Ohio, for the United States.

John F. Wilson, of Columbus, Ohio, and *Lawrence Maxwell*, of Cincinnati, Ohio, for defendants.

[706] HOLLISTER, district judge. The indictment contains three counts, which may briefly and very generally be described as (1) a charge of conspiracy in restraint of interstate trade in cash registers during the three years preceding the date of the indictment, in the manner and by the means set forth; (2) a charge of creating a monopoly, during the

Opinion of the Court.

[1] Among others, the broad question is here presented whether or not there can be any criminal prosecution under the Sherman Anti-Trust Act. The question is of the utmost importance. There is apparently much diversity of opinion upon it, and the Supreme Court have not yet directly passed upon the subject.

Counsel for defendants admit—as they must, in view of the many decisions of the Supreme Court sustaining civil actions under the act, brought either by the Government or by individuals by virtue of express provisions of the act—that civil actions may be prosecuted, but contend that by reason of alleged vagueness and uncertainty, brought about by the decisions in the *Standard Oil case*, 221 U. S. 1, 31 Sup. [707] Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and the *Tobacco case*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, and because the statute itself fixes no standard of lawfulness or unlawfulness to which the conduct of individuals or corporations may be referred, no criminal prosecution can be based upon it.

The statute is vague and uncertain, they say, because, as they assume, the Supreme Court in *United States v. Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, have held that every restraint of trade, however slight or in whatsoever way it might be regarded at common law, comes under the ban of the statute; that by the later decisions the Supreme Court have interpolated the word “unreasonable” into the statute, and hence no man is advised by the statute whether any act contemplated by him is unreasonable or not; and that, as he can not know, neither can any 12 men who are called upon to determine the quality of his acts, and that one jury might take one view and another jury a different view of the same conduct. Predicating their case on these assumptions, the defendants cite important authorities in support of their conclusion.

The substance of all the decisions relied on by them is found briefly stated by Justice Brewer, sitting with Cald-

Opinion of the Court.

tion provided for schedules of reasonable and maximum rates to be made by the railroad commission. In other words, there was a standard of rates provided by the act to which the railroads could conform.

The defendants justly attach importance to the report of the Judiciary Committee of the Senate, January 27, 1909, upon the then proposed amendment of the Anti-Trust Act that:

"No suit or prosecution by the United States under the first six sections of the said act, approved July 2, 1890, shall hereafter be begun for or on account of this act, or any action thereunder, unless the same be an unreasonable restraint of trade or commerce among the several States or foreign nations."

This committee of eminent lawyers reported adversely, saying (page 10 of their report):

"The Anti-Trust Act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is reasonable or unreasonable would render the act, as a criminal or penal statute, indefinite and uncertain, and hence to that extent * * * nugatory and void, and would practically amount to a repeal of that part of the act. * * * Justice Brewer, in the case of *Tozer v. United States*, 52 Fed. 917, makes this perfectly clear and plain. In this case the defendant was indicted for violating the interstate commerce act, * * * and upon this the court holds: 'In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be definiteness and certainty. * * * No penal law can be sustained, unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.'"

Justice Harlan, in his dissenting opinion in the *Standard Oil Case* (221 U. S. 96, 97, 98, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834), quotes at length from that part of the report which deals with this subject. It is not to be overlooked, however, that the learned justice did not himself express an opinion on the point.

Attorney General Bonaparte and Solicitor General Hoyt, in their briefs in *American Express Co. v. United States*, 212 U. S. 522, 29 Sup. Ct. 815, 53 L. Ed. 635, commenting upon the failure of the Elkins Act to limit the word "dis-

Opinion of the Court.

crimination" to "undue" or "unreasonable" or "unjust," argue that criminal prosecutions could not be based successfully upon statutes defining an offense with such uncertainty as the use of these adjectives import into them.

But even if defendants' assumption of the effect upon this statute of the decisions in the Standard Oil case and the Tobacco case be acquiesced in, and even if the word "unreasonable" were actually written into the law, there is strong ground for holding that the Supreme Court have in effect already decided the question.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417, on error to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, involved the Anti-Trust statutes of that State, which made it unlawful for any corporation transacting or [709] conducting any kind of business in Texas to enter into or become a party to any agreement or understanding with any other corporation or individual to fix or regulate the price in Texas of any article of manufacture or merchandise, or to control or limit in Texas the trade in any article of manufacture or merchandise. It was further made unlawful for any such corporation to bring about or permit any union or combination of its capital, property, trade, or acts with the capital, property, trade, or acts of any other person or corporation, whereby the price in Texas of any article of manufacture or merchandise would be fixed or sought to be fixed, regulated or sought to be regulated, or whereby the price in Texas of any such article would be reasonably calculated to be fixed or regulated, or whether the trade in such article would be sought to be controlled or limited, or would be reasonably calculated to be controlled or limited.

It was in that case, among other things, insisted that the Anti-Trust laws of Texas were "so vague, indefinite, and uncertain as to deprive them of their constitutionality, in that they punish by forfeiture of the right to do business and the imposition of penalties, under provisions of an act which do not advise a citizen or corporation, prosecuted under them, of the nature and character of the acts constituting a violation of the law." The objections are found in the

Opinion of the Court

words denouncing contracts and arrangements "reasonably calculated" to fix and regulate the price of commodities, etc., and acts which "tend" to accomplish the prohibited results.

The Supreme Court held that the Anti-Trust laws of Texas were not in contravention of the Constitution, as depriving anyone of due process of law, because vague and indefinite in the prohibition of acts which "tend" or are "reasonably calculated" to restrain trade and competition. The opinion was delivered by Justice Day, who cites *Tozer v. United States* (C. C.) 52 Fed. 917, *Railroad Co. v. Dey* (C. C.) 35 Fed. 866, 1 L. R. A. 744, and *Louisville & Nashville R. R. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 38 L. R. A. 209, 59 Am. St. Rep. 457, and distinguishes the Texas statutes from these, in that those statutes—

"do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

And he goes on to say that the criminal law punishes not only a completed act, but also acts which attempt to bring about the prohibited result, and that it is sufficient if the acts really tend to bring about monopoly and to deprive the public of the advantages which flow from free competition. And he says further (212 U. S. 110, 29 Sup. Ct. 227, 53 L. Ed. 417):

"As to the phrase, 'reasonably calculated,' what does it include less than acts which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished?"

He notes the fact that the decisions which announce the rules on which his opinion is based are in civil cases arising under the Sherman Anti-Trust Act, but he draws no conclusion from the fact. He also notes that the Texas laws were enacted by the legislature of that [710] State and sustained in its courts, and then says (212 U. S. 111, 29 Sup. Ct. 227, 53 L. Ed. 417):

"We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged

Opinion of the Court.

in their tendency to accomplish the prohibited thing. In the evolution of the common law to meet changed conditions, an act directly tending to restrain trade, or the purpose of which was to restrain trade, was an unreasonable restraint, because it brought about an injury to the public, caused by enhancement of prices which the common law in the beginning sought to avoid.

The extent to which the Supreme Court have gone in upholding criminal statutes containing adjectives not exactly describing the offense at which the statute is aimed, but leaving room for the exercise by the jury of some discrimination in determining whether or not the acts complained of come within the characterization of the adjective, is illustrated by the case of *Ellis v. United States*, 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 598, in which the act [711] of August 1, 1892 (27 Stat. 340, c. 852 [U. S. Comp. St. 1901, p. 2521]), limiting the hours of laborers and mechanics employed by the United States or any contractor or sub-contractor upon any of the public works of the United States to eight hours per day except in cases of "extraordinary emergency." Necessarily, what constitutes an extraordinary emergency is a matter of opinion. Different juries might disagree on the same facts, and yet the court were clearly of opinion that whether or not the facts in the particular case constituted an extraordinary emergency might be left to the jury. And, further than that, the court seemingly have taken advanced ground in the modern desire and process of simplifying and freeing from ancient technicalities the administration of the law in criminal cases by declaring that the judge below did right in instructing the jury that the evidence did not show an "extraordinary emergency" within the meaning of the act. In delivering the opinion of the court, Justice Holmes says (206 U. S. 257, 27 Sup. Ct. 601, 51 L. Ed. 1047, 11 Ann. Cas. 589):

"Even if, as in other instances, a nice case might be left to the jury, what emergencies are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end. The ruling was correct."

Opinion of the Court.

There seems to be firm ground upon which to base a ruling, even if the word "unreasonable" had been written into the statute, or even if the Supreme Court have read the word "unreasonable" into the statute, that the Anti-Trust Act would not be so vague and uncertain, and so lacking in establishing a standard to which the acts of merchants must conform as to infringe any constitutional guaranties. But it is not true that the decisions in the Standard Oil case and in the Tobacco case have introduced the word "unreasonable" into the statute, or have required the use of that adjective in describing such acts as are to be avoided by those who wish to comply with the law, and it is not true that there is no standard erected by the statute by reference to which a man may know whether or not his acts come within its inhibition.

The Supreme Court say in those cases that the statute must be interpreted in the light of reason, guided by the principles of law, and to effect the purpose the law against restraints of trade always had in view. That purpose originally was to prevent restraints of any kind upon the free flow of commerce, since restraints brought about the attendant evils, particularly the enhancement of prices. The evils were at first supposed to flow from every restraint upon commerce, and the common law forbade any restraint. But in the course of time and under changed conditions it was seen that the application of the common law in its strictness was a bar to the free flow of commerce and proper development of trade, rather than a protection to it; and for that reason, but to accomplish the same purpose, namely, the protection of the public and the preservation of the right of individuals to contract, a rule by way of exception to the common law arose, which looked to the purpose or motive which underlaid contracts or acts in restraint of trade. If the purpose was to injure the public, by limit[712]ing or suppressing competition and the right of individuals to contract, thereby enhancing prices and bringing about monopoly in whole or in part, or tending to do either, then such contracts or acts were held, under the changed condition of things, to be in restraint of trade.

Partial restraints—restraints incidental or collateral to the main purpose of the contract, accidental, secondary, or

Opinion of the Court.

remote, and not directly the effect of it—are not regarded as restraints in the view of the law, in that they do not bring about the evils to which the public and individuals are subject by the suppression or the limiting of free competition, which same evils were aimed at by the rule at common law as it was originally and as it, in its evolution to bring about the same ends, has become; that is to say, such restraints are not wrongful. This is clearly pointed out by Chief Justice White in the *Standard Oil* case, and he shows that that was the state of the law at the time the Sherman Anti-Trust Act was passed, both in England and in the United States (*Standard Oil case*, 221 U. S. 56, 31 Sup. Ct. 514, 55 L. Ed. 619, 34 L. R. A. [N. S.] 884 et seq.), and he shows to the extent of conclusive demonstration that, notwithstanding the apparent decisions in the *Freight Association* case and in the *Joint Tariff Association* case, in reality the rule applied in their decision was the same as the “rule of reason” adopted in the *Standard Oil* case. He proves that the contracts enjoined in those cases were enjoined, not because there might incidentally result some restraint of trade in their operation, but because they operated directly and immediately upon interstate trade, and thereby suppressed or limited competition and created or tended to create monopoly, which results the common law forbade from the beginning. After reviewing the early English cases and acts of Parliament on the subject he says:

“From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law.”

And as the conclusion and the summing up of the whole matter he says (221 U. S., at page 58, 31 Sup. Ct. at page 515, 55 L. Ed. 619, 34 L. R. A. [N. S.] 884):

“Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or

Opinion of the Court.

other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal of all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, *but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as the enhancement of prices, which were considered to be against public policy.*" (The italics are mine.)

[713] When, therefore, a contract is of such character that it in itself directly brings about a restraint of trade, or tends to do so, it is wrongful, and comes within the description and meaning of the Anti-Trust act. The purpose of such a contract is disclosed on its face, and the contractors will be presumed to intend the consequences it naturally entails. When the acts which are in restraint of trade, or monopolize—which is the same thing (*Standard Oil Case*, 221 U. S. 61, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834)—or tend to monopolize trade, are proved, it is decided that the persons charged are to be held to have intended the necessary and direct result thereof. *Addyston Pipe Co. v. United States*, 175 U. S. 216, 243, 20 Sup. Ct. 96, 44 L. Ed. 136.

In *Ellis v. United States*, 206 U. S. 246, 257, 27 Sup. Ct. 600, 602, 51 L. Ed. 1047, 11 Ann. Cas. 589, it appears that Ellis attempted to justify the employment on a public work undertaken by him of men for nine hours a day (the statute making such employment for more than eight hours unlawful) on the ground that he had more difficulty than he expected in getting certain oak and pine piles called for by the contract and was in a hurry to get the work done. The trial court instructed the jury that, if Ellis intended to permit the men to work over eight hours, he intended to violate the statute. In passing upon this charge, Justice Holmes said:

"The argument against the instruction is that the word 'intentionally' in the statute requires knowledge of the law, or at least

Opinion of the Court.

that to be convicted Ellis must not have supposed, even mistakenly, that there was an emergency extraordinary enough to justify his conduct. The latter proposition is only the former a little disguised. Both are without foundation. If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

"In every case," says Chief Justice White, "where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied." *Standard Oil Case*, 221 U. S. 66, 31 Sup. Ct. 518, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834.

From the decisions in the *Standard Oil* case and in the *Tobacco* case and in the cases in the Supreme Court involving the Anti-Trust Act, and the evolution of the common law (*Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. 553, 32 L. Ed. 979; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689; *Shawnee Compress Co. v. Anderson*, 209, U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865; *Mogul Steamship Co. v. McGregor*, L. R. [1892] A. C. 25, as illustrations) to meet modern conditions, and not to unduly restrain, but to encourage, trade, it may be said that a contract, combination, or conspiracy is in restraint of trade when it directly affects trade, and is entered into with intent to do wrong to the general public and to individuals, by restraining the free flow of commerce, and by bringing about or tending to bring about the maintenance or enhancement of prices, which, but for such acts, would adjust themselves [714] under conditions of free competition. Here, then, is to be found the standard of conduct, the absence of which, say the defendants, nullifies the criminal provisions of the Anti-Trust Act. See remarks of the Chief Justice, *Standard Oil Case*, 221 U. S. 58, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834.

The defendants admit, as they must, that ignorance of the law will not excuse them. They must be held, then, to have known that at common law every restraint of trade was

Opinion of the Court.

wrongful, and hence that if they did what the indictment charges them with having done, their acts were contrary to the Anti-Trust Act in its literal language; and they must be held to know of the exception to the common law which gives them a wider field of operation—which makes every restraint, brought about with the wrongful purpose of preventing the free flow of commerce and limiting the right of the individual to contract, unlawful. Let the act be interpreted either literally or in the light of reason—that is to say, to effect the purposes of the common law as they were from the beginning, whether meaning any restraint at all, or any restraint brought about by wrongful purpose—the defendants, if the acts charged in the indictment are true, were advised of the prohibitions of the act and the penalties provided therein. If the facts alleged are true, wrongful purpose is disclosed in every one of them. Indeed, if the defendants have in fact done what they are charged with having done, there is exhibited in this indictment a flagrant case of commercial piracy.

While the Supreme Court have not as yet directly sustained the validity of the Anti-Trust Act as a criminal statute, yet the subject has received consideration by eminent authority. The constitutionality of the act has been sustained by Judge Carpenter in the Beef Trust prosecution, in his charge to the jury; by Judge Angell in the Bathtub Trust prosecution, in which he overruled the demurrer to the indictment; by Judge Hand, in the Sugar Trust prosecution; and by Judge Putnam, in the Shoe Machinery Trust case (D. C.), 195 Fed. 578, all since the decisions in the Standard Oil case and in the Tobacco case.

The act does not primarily grant any right to be enforced in a civil action. It creates an offense, a crime, describing what the crime is. To do the acts proscribed in the first and second sections is declared to be unlawful; that is to say, criminal. Hence the right given by section 7 to an individual to recover for injury to his business or property with threefold damages, and the right given by section 4 to the Government to prevent by injunction a continuance of the acts complained of, are rights growing out of the commission of a crime, by whomsoever it may be, whose acts also sub-

Opinion of the Court.

ject him to the criminal penalties of the statute. If he has been guilty of a crime described in sections 1 or 2, then he may be restrained by the Government in a civil action, or be compelled by an individual who has been injured in his business or property to respond in threefold damages.

In *United States v. Swift* (D. C.), 188 Fed. 92, 95, 96, 97, the so-called Beef Trust prosecution, Judge Carpenter points this out very clearly, showing that the Supreme Court must have considered and passed on the act as a criminal statute in giving effect to the civil [715] proceedings provided by it. And it is most persuasive that Chief Justice White, then associate justice, in his dissenting opinion in the *Freight Association case*, 166 U. S. 290, at page 353, 17 Sup. Ct. 540, at page 563 (41 L. Ed. 1007), says:

"The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled, by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. *Particularly is this rule imperative where the statute in which the words are used creates a crime, as does the statute under consideration, and gives no specific definition of the crime created.* Thus in *United States v. Palmer, supra*, Mr. Chief Justice Marshall, referring to the term 'robbery,' as used in the statute, said (3 Wheat. 630, 4 L. Ed. 471) : 'Of the meaning of the term "robbery," as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law.'" [The italics are mine.]

But it is suggested by counsel for defendants that, inasmuch as there is great contrariety of opinion as to the meaning of the law in its operation as a criminal statute, the demurrer be sustained, in order that the Government may, as authorized by law, at once take the case to the Supreme Court for an early decision, and thereby save the time of the court here, and the annoyance and great expense attendant upon such a long trial as would result from the overruling of the demurrer. One can not but appreciate the force of this suggestion, and its adoption would be an easy way to dispose of the matter; but, on the other hand, there is upon this court the plain duty of deciding the case according to conviction, and of so deciding as to make the law

Opinion of the Court.

effective, rather than to destroy it if its constitutionality is fairly clear. This is in accordance with the established rule that an act of Congress should not be set aside as unconstitutional unless clearly so. *United States v. Coombs*, 12 Pet. 72, 76, 9 L. Ed. 1004; *Presser v. Illinois*, 116 U. S. 252, 269, 6 Sup. Ct. 580, 29 L. Ed. 615; *Hooper v. California*, 155 U. S. 648, 657, 15 Sup. Ct. 207, 39 L. Ed. 297; *Knights Templars et al. v. Jarman*, 187 U. S. 197, 205, 23 Sup. Ct. 108, 47 L. Ed. 139; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 886.

I hold, therefore, from all of these considerations that the Sherman Anti-Trust Act is a valid criminal statute, sufficiently clear in itself to inform the accused of the nature and cause of the accusation against them, and that criminal prosecutions under it in no way deprive the defendants of liberty or property without due process of law.

[2] If this conclusion is right, the defendants are presumed to know the law applicable to their acts or contemplated acts, and are presumed to intend the consequences of them as heretofore shown. The discussion might end here; but other considerations suggest themselves, which, while perhaps not necessary for decision, are so pertinent as to warrant some reference.

Having in view the purposes of the common law and of the exception which has grown up in its evolution, and appreciating that these purposes are the same, there seem to be compelling reasons for the conclusion that moral considerations are involved in the question [716] of the intent with which an act in restraint of trade is done. Judge Hook puts it this way:

"There is more of the decalogue in the common law respecting the trading of merchants than is sometimes supposed." *United States v. Standard Oil Co. (O. C.)*, 173 Fed. 177, 196.

Eminent authority, beginning with Lord Chief Justice Hale (*Taylor's case*, 1 Vent. 293, 3 Keb. 607), have declared that the Christian religion is a part of the law of England. There are in a number of States decisions to the effect that the same is true of the law of the United States, and it is said by Justice Brewer in *Church of Holy Trinity v. United*

Opinion of the Court.

States, 148 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, that the United States is a Christian Nation. No finding on this question is here made, for it is not necessary; but it may safely be said that civilization, as we understand it, so far as the recognition of the individual in the community and his rights are concerned, is the outgrowth of the appreciation that, among many other things, dealings between man and man must be on terms of justice, and justice requires that no man shall build up his business by acts whose purpose is to put the purchasing public at his mercy or to exploit others for his advantage, and destroy thereby the opportunities of others to exercise their talents and desires in the same field of mercantile activity. The common law in many of its phases developed through the appreciation of these rights and is based upon justice in the abstract. It may therefore be said to have a moral basis.

The ancient law against some voluntary restraint put by contract on an individual's right to carry on his particular trade or calling was established because it was deemed that such restraints were injurious to the public as well as to the individuals who made them; and the evils of monopoly are:

"(1) The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; (2) the power which it engendered of enabling a limitation on production; and (3) the danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale." *Standard Oil case*, 221 U. S. 52, 31 Sup. Ct. 512, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834.

It was unjust to the community that a man should contract away his right to do business, and thereby possibly become, with his family, a charge on the community. It was unjust to the community to monopolize a product, and thereby enhance, or have the power to enhance, the prices the public were to pay for it. It was unjust to deprive an individual of his right and power of freely contracting, and of carrying on any lawful business he desired, and selling his product at prices fixed by free competition; and it was recognized that when the evils were brought about by the purpose to inflict them, then that purpose was wrongful, and wrongful because unjust. If in a remote and comparatively barbarous

Opinion of the Court.

civilization every contract in restraint of trade was deemed wrong, hence unlawful, because it was thought to work an injury to the public and to individuals, and if in our own time of advanced civilization the contract in restraint of trade is held to be wrong, hence unlawful, because its purpose is to bring about the same [717] injuries, then the motive underlying the contract is the criterion by which the contract is to be judged.

If in the doing of a thing a man entertains a wrongful purpose, he knows it better than anybody else can know it. And if, under the law, a man is presumed to intend the consequences of his acts, how much the more must he be held blameworthy when his deliberate purpose is to bring about the evils condemned by the common law from the beginning—condemned because restraints of trade were wrongful to the community and to the individual and wrongful because they were unjust?

It is hard to sympathize with the often-repeated expression that a merchant is not advised by the Anti-Trust act of the character of a contemplated act. If the act is wrong under commonly accepted moral or ethical standards, it was wrong at common law, and wrong under the exception to the common law, and always was and always must be wrong, so long as there is community life, with common and relative rights belonging to each individual in the community and to the public as a whole. How can any fair-minded man engaged in trade, whose deliberate purpose in his acts and contracts in trade is to work injustice to his competitors and to the public, honestly claim want of knowledge of the quality of his acts? The Golden Rule may not as yet be the standard by which the law requires contracts in restraint of trade to be measured, but the ancient adage, "Live and let live," has its application to trade and is a safe rule to go by.

But it is said that contracts and acts in restraint of trade were not criminal at common law. It is unnecessary to decide whether they were or not, for they are made criminal by the Anti-Trust act, and by it the defendants were advised either that it meant every contract in restraint of trade, a

Opinion of the Court.

construction which would hamper rather than encourage trade, or that it meant such contract, the purpose of which was wrongful in the sense so often hereinbefore stated.

The claim that the act is in contravention of section 1 of Article I of the Constitution, which lodges all legislative power in the Congress, and of the tenth amendment, which reserves to the States or the people powers not delegated to the United States by the Constitution, nor prohibited by it to the States, is passed with only the remark that the Supreme Court in the Standard Oil case and the Tobacco Trust case did not attempt to make the law, but merely to declare it; as was their duty, and that it is now somewhat late, in view of the many decisions of the Supreme Court upholding the act in question, to claim that Congress has no power to regulate interstate commerce through the means adopted in this act. *Northern Securities case*, 198 U. S. 197, 347, 24 Sup. Ct. 436, 48 L. Ed. 679.

[3] We pass, then, to the grounds of complaint directed to specific allegations in the indictment itself. It is claimed that the averments in the several counts are too general, vague, indefinite, and uncertain to inform the defendants of the nature and cause of the accusation against them, or to apprise them with such reasonable certainty of the offense with which they are charged, or what they may expect to meet on the trial, as to enable them to make their defense.

The first count describes cash registers, with the statement that for [718] the past 20 years many concerns have been engaged in the business of manufacturing and selling them and sets forth the names of some 33 different cash register companies, and avers that of the total business of making cash registers the National Cash Register Company has done from approximately 80 per cent, early in the period of the 20 years, to approximately 95 per cent at the latter end thereof. It then avers that all the cash register companies during that time have sold the greater portion of their product to users and dealers in all other parts of the United States than those wherein the registers were manufactured, and have consigned registers for sale to dealers, and to their own agents, in other States, and shipping the

Opinion of the Court.

same to these various persons, the number of which would be impracticable, if not impossible, to set forth. It then sets forth a list of names of some 137 individuals, who were officers and agents of the National Cash Register Company, and the dates at which each had been actively engaged in the management of the business and the nature of his official relation to the company. Included in the list are the names of 30 persons who are the defendants in the case, and the count charges that by virtue of their official relation to the company they controlled and directed its business from the dates when they became officers or agents, and that they knowingly and consciously participated in a corrupt conspiracy in undue, unreasonable, direct, and oppressive restraint of the interstate trade described and carried on by the several concerns other than the National Cash Register Company; that is to say, a conspiracy to restrain, and which did restrain, such commerce, and by divers unfair, oppressive, tortious, illegal, and unlawful means, and means which, "consideration being given to the advantage over said other concerns held by said the National Cash Register Company in consequence of its resources being, as they were, so great as compared with those of such other concerns, respectively," the defendants "have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce, none of which has been justified or warranted by any letters patent." Then a description of the conspiracy and means are set forth, the effect of which is that the defendants intended to restrain the free flow of interstate trade so carried on by the concerns named, other than the National Cash Register Company, and to compel those concerns either to go out of business or sell and transfer their business to the National Cash Register Company, so that it could, as in most cases it did, discontinue the business of the other concerns so acquired by it, and thereby effectually eliminated and prevented all competition of the other concerns with the National Cash Register Company.

The count then goes on to say that the defendants, as officers and agents of the National Cash Register Company, have "by concerted action and continuous endeavor carried on the business and affairs of said the National Cash Regis-

Opinion of the Court.

ter Company upon a plan involving—" Then follow 11 different descriptions of acts, all of a general character, so far as the naming of particular instances is concerned, but all very specific as describing a course of conduct. And the count winds up with the charge that the 30 defendants, "during the three years next preceding the finding and presentation of this indictment [719] at and within said Western Division of said Southern District of Ohio, in manner and form in this count of this indictment aforesaid, unlawfully have knowingly engaged and consciously participated in a conspiracy in undue, unreasonable, direct, and oppressive restraint of trade and commerce among the several States in cash registers, and one to restrain, and which has restrained, that trade and commerce by unfair, oppressive, tortious, illegal, and unlawful means, and means which have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce."

It would manifestly be impossible to set forth in detail each separate transaction and the names of the individuals engaged therein, by which those plans of operation were carried out, without producing a paper so voluminous as probably to warrant the court in striking it from the files of its own motion as needlessly incumbering the record. The names of the individuals who carried on the various transactions, the names of the other cash register companies which were dealt with as alleged, and the quality and character of the acts by which the alleged illegal results were obtained are all clearly detailed. If there were no such transactions, then, of course, the Government would fail; and if there were any innocent transactions through any of these individuals or other employes of the National Cash Register Company who are named, all the facts connected with those transactions are in the possession of the defendants, who know them better than anybody else can know them, and if they are susceptible of an explanation consistent with innocence, the defendants know whom to call in their defense. It would seem that the particulars for which the defendants call are matters of evidence which the Government must produce when it attempts to prove the charges

Opinion of the Court.

made by it. *King v. Eccles*, 1 Leach, 274; *King v. Parsons*, 1 Bl. Rep. 392; *Cope's case*, 1 Strange, 144.

These defendants are charged with a conspiracy in restraint of trade in cash registers generally, and particularly that carried on by the several concerns named. The defendants, as officers and agents of the National Cash Register Company, were in control of its affairs, as alleged. They know the detail of dealings between that company and each of those concerns, and the manner of treatment of them by the National Cash Register Company as the agency through which the officers and agents controlled and operated, and the methods of their respective absorption, if they were absorbed, by the National Cash Register Company. They must know whom to call in each to establish their defense. It seems to me they are advised of the nature of the charges against them quite sufficiently for them to make a defense, and that, under the peculiar circumstances of the case, it is sufficient to set out the character of the acts of the defendants controlling the National Cash Register Company, and that these acts had to do with the various other cash register companies named. While no direct authority may be found completely justifying a charge in an indictment framed as this is, yet I think it meets the rule of particularity of time, place, and circumstances, laid down in *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, and other cases.

The Supreme Court say that the object of an indictment is to furnish the accused with such a description of the charge as will enable him to make his defense and avail himself of his conviction or acquittal for protection against further prosecution for the same cause, and to inform the court of the facts alleged, so that it may decide whether it is sufficient in law to support a conviction, if one should be had. They say that a crime is made up of acts and intents, and that these must be set forth in the indictment with reasonable particularity as to time, place, and circumstance. The facts alleged reasonably meet this test. In this connection the remarks of Mr. Justice Holmes in *Swift & Co. v. United*

Opinion of the Court.

Judge Noyes, in *United States v. Patten* (C. C.) 187 Fed. 664.

I agree with Judge Holt in *United States v. Kissel* (C. C.) 173 Fed. 823, 825, who expresses the opinion that:

"Under this statute (Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3876]) a mere conspiracy is not an offense; but, in addition to the conspiracy, one or more of the parties to it must do some act to effect its object before a criminal prosecution can be maintained. * * * This indictment is necessarily brought under these provisions of the Sherman Act. No indictment can be brought in the United States courts for the offense of conspiracy at common law, because it has not been made an offense by any United States statute. Nor could this indictment have been brought under section 5440 of the United States Revised Statutes, because there is no law of the United States making a conspiracy in restraint of trade or to monopolize trade an offense against the United States except the Sherman Act, and there can not be a conspiracy to engage in a conspiracy. Under the Sherman Act no overt act is necessary to the commission of the offense. That provides that every person who engages in a conspiracy in restraint of trade or commerce, or to monopolize trade, is guilty of the offense."

This ground of demurrer is, therefore, held to be untenable.

[8] The defendants claim, further, that the second count in the indictment is bad, in that it charges that the defendants (page 21)—

"by drawing to said the National Cash Register Company and causing that company to grasp it, monopolized a part of the trade and commerce among the several States in cash registers, that is to say, that part of said trade and commerce which, but for their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner in said first count specified would, during that period, have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company, mentioned in said first count as having carried on business during said three years."

The objection is twofold. The first is that the "part" of trade referred to is not a part of trade and commerce within the meaning of the Anti-Trust act, and the Standard Oil case is cited, wherein it is said (221 U. S. 61, 31 Sup. Ct. 516, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834):

"The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographi-

Opinion of the Court.

[9] The same point is raised among the objections to the third count, and is here dealt with in the same way. The chief specific attack on the third count is that it charges only a continuance of the result of an alleged crime and does not charge any coöperation to keep it up, and is, therefore, bad under the rule stated in *United States v. Kissel*, 218 U. S. 601, 607, 31 Sup. Ct. 124, 125 (54 L. Ed. 1168):

“The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irvine*, 98 U. S. 450 [25 L. Ed. 193]. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous coöperation of the conspirators to keep it up, and there is such continuous coöperation, it is a perversion of natural thought and of natural language to call such continuous coöperation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success.”

This count charges the defendants with having, before the period of three years prior to the date of the finding of the indictment, in the manner and by the means described in the first count, engaged in the conspiracy therein described, and having monopolized that part of the interstate trade in cash registers its said 33 competitors would have secured or retained, unlawfully, with knowledge, “continued to hold, conduct, and carry on said interstate business of said the National Cash Register Company, so by said means before said period augmented, and thereby have monopolized said interstate trade and commerce in cash registers.” The charge, then, is that, having monopo[725]lized the trade through the conspiracy and the means set forth in the first count, the defendants are guilty of monopolizing the trade continually for the three years prior to the date of the indictment; that is to say, the conspiracy having ended and

Statement of the Case.

are set forth, and did in fact restrain the same by certain illegal and unlawful means, and thereby wrongfully and irresistibly excluded others from engaging in that trade, none of said acts being justified or granted by letters patent, a description of the conspiracy and means being set forth as follows:

"Intending to obstruct, restrict, and restrain the free flow of said interstate trade and commerce so carried on by said concerns other than said the National Cash Register Company, and compel those concerns either to go out of business or to sell and transfer their business and their facilities and instrumentalities for carrying it on to said the National Cash Register Company, so that said the National Cash Register Company could, as in most cases it in fact did, discontinue the business and the use of the facilities and instrumentalities so acquired by it, and thereby effectually and inevitably to eliminate and prevent all competition of such other concerns with said the National Cash Register Company (all of such other concerns being hereinafter referred to as competitors), said defendants, in their several capacities as such officers and agents of said the National Cash Register Company, have by concerted action and continuous endeavor carried on the business and affairs of said the National Cash Register Company upon a plan involving."

Then follow 11 different descriptions of acts as the means through which the alleged conspiracy was carried into effect for the purpose of bringing about the restraint of trade complained of.

The Government introduced evidence tending to show that the National Company had bought out the Lamson Cash Register Company, of Lowell, Mass., and a number of other cash registers, from time to time. When the Government rested its case, the defendants put a patent expert on the stand, to whom defendants' counsel exhibited a Lamson cash register with a case on it, and a Lamson cash register with the case taken off it, and asked the witness to state to the jury whether he found in this machine the invention covered by the Ritty and Burch patent. That patent was owned by the National Cash Register Company. The Government objected to the testimony, and the court made the ruling set forth in the opinion.

Sherman T. McPherson, U. S. Atty., of Cincinnati, Ohio,
Edward P. Moulinier, Asst. U. S. Atty., of Cincinnati, Ohio,

Opinion of the Court.

believing, that he is in danger of losing his life, or of great bodily harm. He may then defend to the extent of taking life, if necessary; but surely in trade a wrongful act is no justification for another wrongful act in retaliation.

It is obvious that the question involves the nature of a patent right. There is much confusion and loose language on the subject. It is a right of an intangible character. The result of the idea involved in the [296] patent, embodied in a machine for instance, is the tangible thing. The thing itself may not be used as against the police laws of the State looking to the health, comfort, and welfare of its citizens. It may be taxed. It may be taken on execution. Not so with a patent right itself. A man may have a valuable patent, for instance, on a combination of ingredients making an effective explosive; but his right to use and his process of making or conveying the same may be guarded by laws in such a way as to restrict the great gain he might otherwise make through the exercise of his patent right, though he would still have the right to exclude all others from interfering with his patent right. The patent right, and the article embodying the discovery or invention, are two distinct and entirely different things.

A man may make a valuable discovery. He can disclose it, or not. He cannot complain if somebody else makes the same discovery, and takes from him the benefit of his discovery. If he discloses it, the discovery is common property. He may, however, obtain a patent, and if he has not made public use or sale of the article within two years from the date of his application for a patent, he is given certain rights. These are found in the laws of Congress, for he does not have them of common right; nor without his patent, does he have any right to his discovery not shared in by the whole community; and when he gets those rights, he has them only by virtue of the patent laws. If the patent is valid, he may for 17 years restrict, to the extent of exclusion, the rights which the rest of the community would otherwise have. Therefore the laws of Congress must be looked to in order to determine what it is that he gets, for he has no patent right except such as there found. These will be

Opinion of the Court.

The Supreme Court say of the agreements complained of in the *Bath Tub Trust case*, 226 U. S. 20, at page 48, 33 Sup. Ct. 9, at page 14 (57 L. Ed. 117), decided November 18, 1912:

"They transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law."

[298] And again, at page 49 of 226 U. S., at page 15 of 33 Sup. Ct. (57 L. Ed. 117):

"Rights conferred by patents are indeed very definite and extensive; but they do not give, any more than other rights, an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."

And as recently as January 20, 1913, the Supreme Court, in *Virtue v. Creamery Package Manufacturing Co.*, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. 404, say:

"Of course, patents and patent rights cannot be made a cover for a violation of law. * * * But patents are not so used when the rights conferred upon them by law are only exercised."

Briefly, the Sherman Anti-Trust Act makes it unlawful to conspire in restraint of interstate trade, or to monopolize or attempt to monopolize the same. The Supreme Court have described a conspiracy as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not unlawful in itself, by criminal or unlawful means. The act does not expressly except articles infringing a patent, nor does it refer to such articles entering into interstate commerce and in actual competition with a patented article.

It is lawful for a patentee to exclude such competition. The patent laws expressly provide that he may do so, and how he shall do it, and even if the combination or agreement complained of were to accomplish even a lawful thing, namely, the monopoly a patentee may have, still, under the definition of a conspiracy, that may not be attained by unlawful means; and if those unlawful means are in fact in restraint of competitive business actually a part of interstate

Opinion of the Court.

conduct, if directed against the business of the competitors and necessarily directly affecting it, is a conspiracy against trade, and if that trade is interstate trade, it is an offense under the Sherman Anti-Trust Act.

[300] The protection to the monopoly which the patentee may have is the right to bring suits, the result of which will establish his monopoly. This has been said in so many words. In *Hawks v. Swett*, 4 Hun. 146, 150, Judges Learned, Boardman, and Potter, in the Third Department of the General Term of the Supreme Court of New York, as existing under the laws obtaining at the time, said—Judge Learned delivering the opinion of the court:

“In order that we should not be misled by any false analogy, it should be noticed that letters patent for an invention confer nothing except a right to bring actions, and thereby to prevent persons from doing what they might otherwise lawfully do.”

It is true that the point upon which the case turned was decided the other way in the Court of Appeals (66 N. Y. 206), but the language quoted is not necessarily involved in the grounds given for the reversal of the judgment below. Presiding Judge Learned repeats the language on this subject, used by him in *Hawks v. Swett*, in *De Witt v. Elmira Mfg. Co.*, 5 Hun (N. Y.) 301, 303. In *Celluloid Mfg. Co. v. Goodyear, etc., Co.*, Fed. Cas. No. 2543, Hunt, Circuit Justice, cites *Hawks v. Swett* on the same question with approval.

The doctrine asserted in this case for the first time, that the rights of the patentee are of such character that those operating under them may agree, in order to protect them, to engage in acts of unfair competition such as are charged in this case, and even to burn their competitor's factory or destroy the competing—as they believe, infringing—machines, by violence, whenever and wherever found, no matter how much it may affect commerce between the States, carried on by competitors, and be amenable therefor only to the police and to the criminal laws of the locality in which such acts were committed, I am unable to agree with. If a patentee has such power under the patent laws, and Congress under its authority to regulate commerce between the States is powerless to protect interstate commerce actually exist-

Opinion of the Court.

ing, it is high time that the patent laws be amended in order to prevent consequences of such shocking character.

Of course, acts of violence by agents of the National Cash Register Company upon agents of its competitors are not immediately involved in the question under discussion, because upon objection by the defendants to the introduction by the Government of testimony tending to show instances of fisticuffs between the agents of the National and the agents of competitors, the testimony was excluded from the consideration of the jury, for the reason, among others, that it might be difficult to determine who was immediately to blame for such occurrences, and it would be wandering from the issues to try incidental issues raised by charges of assault or assault and battery. There was, however, evidence tending to show that one of the National's agents distributed small wires to other agents in his territory for the purpose of their surreptitious introduction into competitors' cash registers, if the customer gave opportunity to the National's agents for close examination of the competitors' cash register in the customer's possession. Aside from that one instance, however, there has been no evidence tending to show actual violence to a competi[301]tor's cash register in the possession of one of its customers. Therefore the argument of counsel for defendants goes further, with that one exception, than the acts of unfair competition the evidence for the Government tends to prove. But the principle is the same, whether the acts of unfair competition were acts of violence upon competitors' cash registers themselves, or acts falling short of actual violence the evidence introduced by the Government tends to show; and counsel's arguments have proceeded upon this basis.

The power of Congress to regulate interstate commerce is complete and supreme. It is lawful to go into the cash register business. Any one may, as a matter of right, go into the cash register business, and make his products the subject of interstate commerce, and may continue to do so until he is restrained by a court of equity, upon the fact being established that he is an infringer; and even after the establishment of such fact, he is amenable only to the court issuing the injunction, or may be subject to the payment of dam-

Syllabus.

the business and the use of such instrumentalities, and thereby eliminate competition, they conspired to accomplish their objects by the means therein specified. *Held*, that it was not the intention of the indictment to allege that each of the competitors of the N. Company named was in existence during the entire 20 years preceding the indictment, nor to disclose when any of them were in existence, but only to allege that during such period there was no time when one or more of such competitors were not in existence.^a

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31 — CRIMINAL PROSECUTIONS — INDICTMENT — CONSTRUCTION.—An indictment alleged that many concerns had been engaged in the manufacture and sale of cash registers, a list of which, so far as known, was therein set out; that certain officers and agents of the N. Company had conspired in restraint of the interstate trade and commerce carried on by the several concerns therein before named other than the N. Company; and that, intending to restrict and restrain the interstate commerce so carried on by “said concerns,” and to compel them to go out of business or sell their business and instrumentalities to the N. Company they had conspired to accomplish the object specified by the means therein set out, alleged to have been directed against “said concerns,” “such concerns,” etc. *Held*, that the indictment did not charge a general conspiracy against all competitors, but only a conspiracy against those therein named.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

INDICTMENT AND INFORMATION 125—DUPLICITY—INDICTMENTS FOR CONSPIRACY.—Though such indictment charged only a conspiracy against the competitors therein named, and though it did not allege that all of such competitors were in existence during all of the time to which it referred, it was not duplicitous as charging a separate conspiracy against each competitor, as its underlying thought was that there was a generic conspiracy against all competitors, which took specific direction against those named as they came into existence, and continued against them as long as they remained in existence, and therefore it charged a single conspiracy.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. 125.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—INDICTMENT—CERTAINTY.—Though under such indictment a conviction could be had only in so far as the conspiracy charged existed within the period of limitation and [600] as to the competitors in existence within such period, the allegations as to its prior existence and its existence against competitors who had ceased to exist more than three years

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Syllabus.

before the finding of the indictment being merely descriptive, it was not void for uncertainty for failure to allege which of the competitors were in existence within the three years.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31 — CRIMINAL PROSECUTIONS — INDICTMENT — SUFFICIENCY.—An indictment for conspiring to restrain the interstate commerce of defendants' competitors in cash registers alleged, concerning the competitors therein named, that they had sold the greater portion of the cash registers manufactured by them to users and dealers whose several places of business were situated in States other than those wherein the cash registers were manufactured by such concerns, respectively, and had consigned for sale other cash registers to dealers and to their own agents in such other States; that they had been shipping such cash registers to such users, dealers, and agents in such other States; and that in doing so each of such competitors had been engaged in trade and commerce among the several States. *Held*, that this sufficiently showed that the trade and commerce in which defendants' competitors were engaged was interstate.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 12—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.—Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820), declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations covers only contracts, combinations, and conspiracies which are unreasonably in restraint of interstate trade or commerce, though possibly every conspiracy is unreasonably in restraint thereof, on the theory that there can be no reasonable conspiracy, or conspiracy to do a reasonable thing.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.—Act July 2, 1890, § 1, relative to combinations and conspiracies in restraint of interstate commerce, includes conspiracies between competitors, or between the officers and agents of one competitor, on its behalf, against another competitor, and also includes conspiracies between any persons against any other person.

[Ed. Note.—For other cases see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.—To bring a conspiracy within act July 2, 1890, § 1, it is not essential that its execution be of any benefit to the conspirators; it being sufficient that it will be in restraint of another's interstate trade or commerce.

[Ed. Note.—For other cases see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

Syllabus.

MONOPOLIES 16, 17—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.—

Under act July 2, 1890, § 1, relative to conspiracies in restraint of interstate commerce, the extent of the interstate trade or commerce conspired against is immaterial, and a conspiracy between the officers and agents of one competitor on its behalf to restrain a single interstate sale or shipment by another competitor is covered by it.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 12, 13; Dec. Dig. 16, 17.]

[601] MONOPOLIES 17—STATUTORY PROVISIONS—CONSTRUCTION—

“MONOPOLIZE.”—Within act July 2, 1890, c. 647, § 2, 26 Stat. 209 (Comp. St. 1913, § 8821), making it illegal to monopolize, attempt to monopolize, or combine or conspire to monopolize, any part of the trade of commerce among the several States, there can be no monopolizing in making a single interstate sale, or a great number of such sales, even though wrongful means are used in making them, and a wrong of some other nature is done competitors, since to “monopolize” in a legal and accurate sense is to exclude other persons, though not necessarily all persons, and there can be no monopolizing with respect to a sale which in the nature of things can be made by but one competitor, and in which there can be no common occupation.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

MONOPOLIES 13—STATUTORY PROVISIONS—CONSTRUCTION.—A monopolizing of interstate trade and commerce by efficiency in producing and marketing a better and cheaper article than anyone else is not within act July 2, 1890, § 2.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. 13.]

MONOPOLIES 12—STATUTORY PROVISIONS—CONSTRUCTION.—A combination of competitors, accompanied by an exclusion of outsiders from interstate trade and commerce, or the exclusion by a competitor, or its officers and agents on its behalf, of other competitors, by the use of wrongful means, constitutes a monopolizing of such commerce within act July 2, 1890, § 2.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 17—STATUTORY PROVISIONS—CONSTRUCTION.—While but one competitor can make a sale, and though there can be no monopolizing within act July 2, 1890, § 2, in making a single interstate sale, or a great number of sales, though wrongful means are used in making them, one competitor monopolizes interstate trade and commerce by excluding all or substantially all other competitors from the free opportunity of approaching each and every prospective purchaser on equal terms, or by driving them from the field of freely offering their goods, so as to have that field to himself.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

Syllabus.

MONOPOLIES 17—STATUTORY PROVISIONS—CONSTRUCTION—“ANY PART OF INTERSTATE TRADE OR COMMERCE.”—Within act July 2, 1890, § 2, prohibiting the monopolizing of any part of the trade or commerce among the several States, “any part of interstate trade or commerce” embraces the interstate trade or commerce of all prospective purchasers of a particular commodity in the United States, or in some particular portion thereof, but excludes the interstate trade or commerce of a particular prospective purchaser of a particular commodity.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

INDICTMENT AND INFORMATION 125—DUPLICITY—MONOPOLIES—“MONOPOLIZED.”—An indictment in the first count charged a conspiracy by the officers and agents of the N. Company in restraint of the interstate commerce of its competitors therein named in the cash register business during 20 years, and alleged that during such period the N. Company had done from approximately 80 per cent early in the period to approximately 90 per cent at the latter end thereof, of the business of manufacturing cash [602] registers, and that such officers and agents had conspired to accomplish their objects by the unlawful means therein specified. The second count charged that such officers and agents under the circumstances and by the means set forth in the first count had, by drawing to the N. Company, monopolized a part of the trade which otherwise would have been secured or retained by its competitors, and it made a part thereof the allegations of the first count descriptive of such trade and commerce, the concerns engaged therein, the means employed, and the knowledge, intent, and acts of the defendants. *Held*, that, while “monopolized,” in the light of the context, meant “secured,” the indictment charged defendants with monopolizing interstate commerce in cash registers, and not merely with monopolizing a part of such interstate commerce, and hence charged but a single offense, and was not duplicitious, as the offense of “monopolizing” consists, not only in obtaining or securing a monopoly by wrongful acts, but in holding and maintaining it by such acts, and it appeared from the indictment that the N. Company had a practical monopoly, and that the wrongful means specified were employed to maintain and hold such monopoly.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 384-400; Dec. Dig. 125.]

INDICTMENT AND INFORMATION 59—SUFFICIENCY OF ACCUSATION.—An offense intended to be charged in an indictment need not be charged expressly in general terms; it being sufficient if the facts alleged, if true, show the commission of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 180, 181; Dec. Dig. 59.]

Syllabus.

MONOPOLIES 81—CRIMINAL PROSECUTIONS—INDICTMENT—CERTAINTY.—

Where the first count of an indictment charging the officers and agents of the N. Company with conspiring to restrain the interstate commerce of the N. Company's competitors alleged that during 20 years many concerns had been engaged in a particular business, a list of such concerns, so far as known, being therein set out, without, however, alleging that all of the concerns named were in business during the entire 20 years, or alleging when any of them were so engaged in business, a count charging the defendants with monopolizing the trade which, but for their wrongful acts, would have been secured or retained by the concerns "mentioned" in the first count as having carried on business during the three-year period of limitation, and another count alleging that such defendants, having drawn to the N. Company by the means "mentioned" in the first count that part of the interstate trade in cash registers which otherwise would have been secured or retained by the concerns mentioned in the first count as having carried on business before the period of three years, continued to hold and carry on its interstate business augmented by such wrongful means, and thereby monopolized interstate trade in cash registers, were void for uncertainty; the first count having "mentioned" no concerns as carrying on business within three years or before three years.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 29, 31—CRIMINAL PROSECUTIONS—SUFFICIENCY OF INDICTMENT.—

A patentee and its officers and agents were not guilty of monopolizing interstate trade and commerce in cash registers, in holding such trade and commerce after securing it by wrongful means, if such trade and commerce was covered by its patents; and hence, where an indictment charging that the officers and agents of the patentee, having by wrongful means drawn to the patentee interstate trade and commerce which its competitors would otherwise have secured, continued to hold, conduct, and carry on its interstate business augmented by such wrongful means, and thereby monopolized interstate trade and commerce in cash registers, was defective, where, though it showed that some at least of the patentee's patents had not expired, it did not allege that the trade and commerce so secured and held was not covered by those patents.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 19, 20; Dec. Dig. 29, 31.]

MONOPOLIES 29, 31—STATUTORY PROVISIONS—CONSTRUCTION.—

A party monopolizing interstate commerce by employing wrongful means to drive its competitors from the field does not continue to monopolize such commerce, with act July 2, 1890, § 2, by holding the business so secured after its competitors have ceased to compete; and hence an indictment charging a monopolizing within the period of

Syllabus.

limitations by holding the business previously obtained by such wrongful means was insufficient, where it did not allege the doing of anything to maintain and hold the monopoly during such period.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 19, 20; Dec. Dig. 29, 31.]

INDICTMENT AND INFORMATION 99—ALLEGATIONS AS TO VENUE—REFERENCE TO OTHER COUNTS.—Where the first count in an indictment charged a conspiracy to restrain the interstate commerce of defendants' competitors, another count, alleging that defendants, having by the means and under the circumstances and conditions described in the first count drawn to their company a part of the interstate commerce in cash registers which otherwise would have been secured or retained by its competitors, continued to carry on the interstate business of their company so augmented, and thereby monopolized interstate commerce in cash registers, did not make the allegations of the first count as to venue a part thereof.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. 99.]

CRIMINAL LAW 101—VENUE—STATUTORY PROVISIONS.—Judicial Code (act March 3, 1911, c. 231) § 100, 36 Stat. 1121 (Comp. St. 1913, § 1087), dividing the Southern District of Ohio into two divisions and providing that certain terms of the district court for the Western Division shall be held at Cincinnati and certain terms for the Eastern Division at Columbus, and that terms for the Southern District shall be held at Dayton on dates specified, that prosecutions for crimes and offenses committed in any part of the district shall be cognizable at the terms held at Dayton, and that all suits within either division may be instituted, tried, and determined at such terms, does not require that prosecutions shall be instituted at Dayton, nor that prosecutions instituted at Cincinnati or Columbus shall be transferred to Dayton for trial, and on a trial of the officers and agents of the N. Company, having its plant and principal office at Dayton, where a number of the defendants resided, it was not error to refuse to transfer the case from Cincinnati to Dayton for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 199–205; Dec. Dig. 101.]

CRIMINAL LAW 149—LIMITATION OF PROSECUTIONS—CONSPIRACIES.—Under an indictment charging the officers and agents of the N. Company with conspiring to restrain the interstate business of the N. Company's competitors, which proceeded on the theory that there was a generic conspiracy extending over 20 years against all competitors, which as the various competitors named in the indictment came into existence was directed against them specifically, a conviction could be had only for conspiring in restraint of the trade or commerce of such of the competitors named in the indictment as were in existence during the three years prior to the finding of the indictment, and there could be no conviction for conspiring against

Syllabus.

the competitors who ceased to exist more [604] than three years prior to the finding of the indictment, or for the generic conspiracy so far as it existed prior to the three years.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 273-275; Dec. Dig. 149.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—On a trial of the officers and agents of the N. Company for conspiring to restrain the interstate trade of the A. Company by making to such company and purchasers and prospective purchasers from it threats of infringement suits and by other means, the fact that the N. Company was successful in the lower court in a suit for infringement was at least prima facie evidence of probable cause, though the decree was reversed on appeal.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—On such trial the mere fact that there was a conspiracy or joint purpose on the part of the defendants to restrain the trade of competitors of the H. Company, which ceased to exist before the A. Company was organized, by the use of certain unlawful means, was no evidence that they had such joint purpose as to the A. Company, when during the five years of its existence preceding the indictment there was no manifestation of such purpose.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—Though under an indictment charging the officers and agents of the N. Company with conspiring to restrain the interstate business of such company's competitors, which proceeded on the theory that there was a generic conspiracy against all competitors extending over a period of 20 years, which as the various competitors named in the indictment came into existence was directed against them, there was evidence to make a question for the jury as to a conspiracy within the period of limitations only as against the A. Company, and only with respect to certain of the means of accomplishing the objects of the conspiracy set forth in the indictment, evidence that the defendants were parties to a generic conspiracy of the character mentioned, and that they conspired in restraint of competitors named who ceased to exist before the A. Company was organized, by the use of means other than those shown to have been employed against the A. Company within the period of limitations, was admissible as bearing on the question whether there was a conspiracy against the A. Company when it came into existence, which continued into the period of limitations.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—Where such indictment alleged that to accomplish the objects of the con-

Statement of the Case.

as in this count above set forth, they, respectively, became officers and agents of said the National Cash Register Company to the day of the finding and presentation of this indictment, or to the days when they ceased to be such officers and agents in cases where they did so cease to be such officers and agents at and within said Western Division of said Southern District of Ohio, knowingly engaged and consciously participated in a corrupt conspiracy in undue, unreasonable, * * * restraint of said interstate trade and commerce so as aforesaid, during such times, carried on by the several concerns in this count above named other than said the National Cash Register Company—each of said defendants then and there well knowing, as he then and there did know, all the premises in this indictment aforesaid; that is to say, a conspiracy to restrain, and which during and throughout such times has in fact restrained, said last-mentioned trade and commerce by divers unfair * * * means which, consideration being given to the advantage over said other concerns held by said the National Cash Register Company in consequence of its resources being, as they were, so great as compared with those of such other concerns, respectively, have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce, none of which has been justified or warranted by any letters patent.”

From this charge in “generic terms” the count descended to “particulars.” It characterized the particular allegation which followed as a “description” of the “conspiracy and means” thereby charged. In strictness it was an allegation of facts the doing of which it was claimed constituted the offense charged generally. The allegation was that, “intending to obstruct, restrict, and restrain the free flow of said interstate commerce so carried on by said concerns other than the National Cash Register Company, and compel those [612] concerns either to go out of business or to sell and transfer their business and facilities and instrumentalities for carrying it on to said the National Cash Register Company, so that said the National Cash Register Company could, as in most cases it in fact did, discontinue the business and the use of the facilities and instrumentalities so acquired by it, and thereby effectually and inevitably to eliminate and

Statement of the Case.

great extent thereof and because the same are unknown to them, the said grand jurors, to enumerate or describe the items of such trade and commerce in cash registers so monopolized by said defendants; and the allegations of said first count, descriptive of such cash registers, of said interstate trade and commerce in the same, and the concerns engaged therein, and of the means employed by said defendants to restrain said interstate commerce and the allegations of said first count as to knowledge, intent, and overt acts on the part of and by said defendants being incorporated in this count by reference as fully as if they were repeated in this count as part of the charge of monopolizing in this count made."

The third count likewise contains a single long sentence, and charges that the defendants, "having before the period of three years next preceding the * * * indictment, in the manner, by the means, and under the circumstances and conditions mentioned and described in the first count, * * * engaged, as said grand jurors * * * here charge they did engage, in the unlawful conspiracy in said first count described, and having, in and by so engaging in that unlawful conspiracy, drawn, as said grand jurors * * * here charge they did draw, to said the National Cash Register Company, and caused, as said grand jurors * * * charge they did cause, said the National Cash Register Company to grasp, a part of the trade and commerce among the several States in cash registers; that is to say, that part of said trade and commerce which, but for their so engaging in that unlawful conspiracy and their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner and under the circumstances in said first count specified, would have been secured or retained, as a matter of lawful right, by the divers concerns other than said the National Cash Register Company, mentioned in said count as having carried on business, before said period of three years (said means being, as in said first count shown and charged, unfair * * * under said circumstances as against said other concerns, and of a nature under said circumstances irresistibly to exclude those concerns from engaging in that trade and commerce), and each of said defendants, well knowing all the premises in this in-

Opinion of the Court.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689, said:

"The idea of monopoly is not now confined to a grant of privileges, but is understood to include a condition produced by the acts of individuals."

In the case of such a monopoly it would seem that it is not essential that all but the insiders be wholly excluded, so that they have the whole field to themselves. It is sufficient that outsiders are substantially excluded, so that the insiders have to themselves approximately, or "a largely preponderating part of," the whole field. But the section does not cover every monopolizing by the acts of individuals. A monopolizing by efficiency in producing and marketing a better and cheaper article than any one else is not within it. However, possibly, efficiency is so abundant that in experience there never will be, as there never has been, such a monopolizing. It is possible for there to be a monopolizing by a combination of competitors. Such combinations have been divided into "combinations by agreement," or "loose combinations," in which each member of the combination remains in the field, notwithstanding the combination, as in the case of *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and "combinations by fusion," or "corporate combinations," as in the *Standard Oil* and *Tobacco* cases. Possibly in cases of the former class, where there is no exclusion of outsiders, it is not proper to say that there is a monop[620]olizing, as in that contingency there is no exclusion. At most it may not be proper to say more than that there is a combination in restraint of trade. But in the latter case, notwithstanding there is no exclusion of outsiders, there is no reason for not characterizing what has been done as monopolizing, for in such case there is exclusion. The members of the combination are excluded for the benefit of the single corporation into which they are fused. Mr. Justice McKenna seems to have had such monopolizing in mind in the case of *National Cotton Oil Co. v. Texas*, *supra*, when he said:

"Its [monopoly's] dominant thought now is, to quote another, 'the notion of exclusiveness or unity'; in other words, the suppression of

Opinion of the Court.

competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' "

A combination of competitors, accompanied by exclusion of outsiders, and the exclusion by a competitor, or by its officers and agents on its behalf, of competitors by the use of such means as are charged here, clearly constitute monopolizing within the section. Mr. Chief Justice White in *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, pointed out that monopolizing was a species of restraint of trade or commerce, so that a combination or conspiracy to monopolize a part of interstate trade or commerce is covered by both sections. In this particular they overlap. We have seen that conspiracies in restraint of trade and commerce are not confined to conspiracies by competitors, or on behalf of a competitor against a competitor. It is not even necessary that the execution of the conspiracy be of any benefit to the conspirators. It is sufficient that it will restrain the interstate trade or commerce of the person conspired against. But in the case of monopolizing under the second section, where there is exclusion by a competitor, or a combination of competitors, of competitors substantially from interstate trade or commerce, it is in order that the former may have the whole or approximately the whole of the field to itself or themselves. It is penalized, so that there may be no such exclusion, and the field may be occupied by all on equal terms.

It follows from this general survey that there can be no monopolizing in the legal and accurate sense of the word where there can be no common occupation. Where in the very nature of things there must be exclusion of all others but one, there can be no monopolizing. Hence, it would seem that there can be no monopolizing in making a single interstate sale, or in making a great number of such sales, even though wrongful means are used in making them. A wrong has been done the competitors, but the wrong is not that of monopolizing. In the very nature of things but one competitor can make the sale. The idea that such conduct

Opinion of the Court.

constitutes monopolizing is not according to the legal and accurate meaning of the word. It can only be such according to a popular conception thereof.

[13] But, though but one competitor can make a sale, all competitors can enjoy the free opportunity of approaching each and every prospective purchaser on equal terms, with the chance of making a [621] sale if he can persuade him to buy. For one competitor to exclude all or substantially all other competitors from such opportunity—i. e., drive them from the field of freely offering their goods, so as to have that field to himself—is to monopolize according to the legal and accurate sense of the word.

[14] This leads to a consideration of what is “any part” of interstate trade or commerce, within the meaning of the section. What are the possible parts of interstate trade or commerce that may be covered by it? The interstate trade or commerce in a particular commodity of all prospective purchasers thereof in the United States is a part of interstate trade or commerce; also the interstate trade or commerce in such commodity of all prospective purchasers thereof in some particular portion thereof is a part thereof. And also the interstate trade or commerce in such commodity of any prospective purchaser thereof wherever located in the United States is a part thereof. There can be no question that the first two are parts of interstate trade or commerce within the meaning of the statute. The case of *Montague v. Lowery*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, involved a monopolizing of the second part of interstate trade or commerce above referred to. The only question is as to the third part. Is the interstate trade or commerce of a prospective purchaser a part thereof within it? The case of *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, involved the question whether it is. There a manufacturer of plug chewing tobacco had refused to sell to a jobber unless he would agree not to purchase such tobacco from its competitors, but to give his entire business to it, and the question was whether such conduct on its part was an attempt to monopolize a part of interstate trade or commerce under the section. This

Opinion of the Court.

depended on whether the interstate trade or commerce of that jobber was a part of such trade or commerce within its meaning, and whether the means by which it was attempted to monopolize it was wrongful. It was held that the case did not come within the section. The apprehension that, if it was held that it did, then every interstate sale would be within it, seems largely to have brought it about. This is to be gathered from certain expressions in Judge Sanborn's opinion, repeated in *United States v. Standard Oil Co.* (C. C.) 173 Fed. 177, 191. He there said:

"Undoubtedly every person engaged in interstate commerce necessarily attempts to draw to himself, to the exclusion of others, and thereby to monopolize, a part of that trade. Every sale and * * * transportation of an article which is the subject of interstate commerce evidences a successful attempt to monopolize that trade or commerce which concerns that sale or transportation. If the second section of the act prohibits every attempt to monopolize any part of interstate commerce, it forbids all competition therein, and defeats the only purpose of the law; for there can be no competition, unless each competitor is permitted * * * to draw to himself, and thereby to monopolize, some part of the commerce."

But there was no reason for such apprehension, for, as we have seen, interstate sales do not come within the section, because in such cases there is no monopolizing. It is only the conception of the meaning of that word according to popular speech that could create such [622] an apprehension. It was such a conception that led Judge Ward in *United States v. American Tobacco Co.* (C. C.) 164 Fed. 700, 727, to say:

"As this section prohibits a monopoly of, or an attempt to monopolize, any part of such commerce, it can not be literally construed. So applied, the act would prohibit commerce itself."

In dealing with this subject the Supreme Court, speaking by the Chief Justice, in the *Standard Oil Company case*, 221 U. S. 61, 31 Sup. Ct. 516, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, said:

"The commerce referred to by the words 'any part,' construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

Opinion of the Court.

during the preceding 3 years the National Company had a practical monopoly in cash regis[623]ters. It did approximately 95 per cent of the manufacturing and selling of cash registers. Also, according thereto, the defendants carried on the business of the National Company on a plan involving the use of the means therein set forth, with the intent and purpose to restrain the interstate trade and commerce of all its known competitors and to drive them out of business. Such are the circumstances and conditions under which it is alleged that the defendants had secured for the National Company interstate sales of cash registers by the use of those means which, but for the use thereof, would have been secured by those competitors. Such action on the part of defendants was calculated to hold and maintain the monopoly which the National Company had. It being done with such intent, it was done with the intent to maintain and hold the monopoly. It seems to us, therefore, that the count does charge the commission of the offense of monopolizing interstate trade and commerce in cash registers during the 3 years preceding the indictment. This being so, it is not duplicitous. It charges but a single offense.

[17] But this is not all that is to be said upon this count. The competitors whose interstate trade and commerce are alleged to have been secured by defendants for the National Company by the use of the means complained of are alleged to be those "mentioned in said first count as having carried on business during said 3 years." When, however, we turn to the first count, we do not find any of the competitors named therein mentioned as having carried on business during the 3 years preceding the indictment. It is only on the hypothesis that the count alleges that all of the 32 competitors carried on business during the whole 20 years that it can be said that it mentions those of them who carried on business during the 3 years. But we have seen that the Government does not contend that such is the meaning of the allegation, and we have held that it does not mean it. It means no more than that during the entire 20 years some of the competitors were carrying on business without giving any indication whatever as to when any of them were so

Opinion of the Court.

doing. The competitors, then, whose business it is alleged the defendants secured by the use of those means, are incapable of identification. It is not those who in fact carried on business during the 3 years, but those which the first count mentions as then carrying on business; and it does not mention which of them so did. We see no escaping from the conclusion that the count on this ground is void for uncertainty. We are aware that the point is somewhat technical, and that it is in the air now that the courts should be indulgent to looseness in pleading, even in an indictment. But that indulgence goes no farther than that an indictment is to be "taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech." It should not go to the extent of taking it to mean that which "by a fairly exact use of English speech" it does not mean, or, in other words, when it says competitors "mentioned in said first count as having carried on business during said 3 years," it should be taken to mean competitors who did carry on business during those 3 years. The words of Mr. Justice Brewer in *Clyatt v. [624] United States*, 197 U. S., 207; 25 Sup. Ct., 429; 49 L. Ed., 726, come in here. They are:

"Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

On this ground we think the count is defective, and the court erred in overruling the demurrer thereto.

[18] This brings us to the third count, and we need not spend much space upon it. It charges that the defendants, having before the 3 years preceding the indictment, engaged in the unlawful conspiracy described in the first count, and having by engaging therein drawn to the National Company and caused it to grasp that part of the interstate trade and commerce which, but for their engaging therein and by the use of the means described in the first count, would have been secured or retained by the competitors mentioned in the first count as having carried on business before those 3 years, had during those 3 years continued to hold, conduct, and carry on the interstate business of The National Company so by those means before those 3 years augmented and there-

Opinion of the Court.

way charged, but should have asked the courts to protect its rights. This is a question that will be considered later. In holding onto it thereafter it could not have been guilty of monopolizing, even if otherwise it might have been. The indictment, having thus charged that the National Company had patents covering the cash registers made and sold by it, should have negatived that the trade and commerce which it so secured and held onto was covered by those patents. In the first count it is alleged that defendants' conduct therein complained of was not "justified or warranted by any letters patent"; but it was not meant thereby to charge that the trade and commerce affected by the conspiracy complained of therein was not covered by the National Company's patents, for it is the position of the Government that the defendants were not justified or warranted by those patents in protecting the rights so secured in that way. It is charged in the first count that at the beginning of the 20 years the National Company did 80 per cent of the manufacturing of cash registers. This of itself was a practical monopoly. It is not alleged that it had been secured by wrongful acts. Presumably it was entitled to it under its patents. It is true that it is alleged that long before the 3 years preceding the finding of the indictment most of the basic patents and many of the improvement patents had expired. But this concedes that some of the basic patents were then still unexpired at the beginning of the 3 years, and it is consistent with the fact that such was the case as to a great number of improvement patents. Everything, therefore, which the count alleges, may be true, and yet the National Company have been entitled to hold onto the business which it had so secured, in which case its conduct in so doing could not have been monopolizing.

[19] But otherwise the count does not charge the offense of monopolizing, in that it does not allege that defendants had done anything during the three years to maintain and to hold its monopoly. In the case of a monopoly brought about by monopolizing through a "combination by fusion" or "corporate combination" the monopolizing exists as long as the combination continues to exist. It can at any time be dissolved, and its constituent elements restored to existence.

Opinion of the Court.

But in the case of a monopolizing by wrongful means, as here, the monopolizing ceases whenever the pugnacious competitor ceases to fight. It is not possible to resurrect the competitors who have been slain in the contest and restore to them what they have lost. Such competitor does not continue to monopolize, within the meaning of the statute, in holding onto the spoils of victory. It is never to be lost sight of that actually doing business, no matter how large, is not monopolizing. It is excluding from the opportunity of doing business that is. If it is thought that this is an evil condition of things, which should not be allowed to continue, the answer is that things should not have been allowed to get in that condition. The competitors attacked should have called upon the courts to protect them whilst they were being attacked.

[626] In the case of *United States v. Irvine*, 98 U. S., 450, 25 L. Ed., 193, it was held that the offense of withholding pension money was complete upon its first being withheld, and that it did not continue thereafter, even though the money was never paid to the pensioner. And in the case of *United States v. Kissel*, 218 U. S., 607, 31 Sup. Ct., 126, 54 L. Ed., 1168, Mr. Justice Holmes said:

"It also is true, of course, that the mere continuance of the result of a crime does not continue the crime."

[20] It is also urged that the third count is bad for failing to allege proper venue. It would seem to be clear that it was essential to allege that the offense charged was committed within the district where the indictment was found. Otherwise, the court had no jurisdiction of the offense. It would seem clear, also, that the third count is not aided by the allegation of venue in the first and second counts, unless such allegation is incorporated in the third count by reference thereto. The Government does not differ with the defendants as to these two propositions. Its position is that the allegation of the first count as to venue is so incorporated in the third. It makes this out from the fact that it alleges by way of recital that the defendants had, prior to the three years preceding the indictment, engaged in the unlawful conspiracy charged in the first count "under the circumstances and conditions mentioned and described in the first count."

Opinion of the Court.

But this has reference to the conspiracy charged in the first count. It has no reference to the offense charged in the third count, to wit, of holding, conducting, and carrying on the business unlawfully acquired.

It must be held, therefore, that the third count is bad, and the lower court erred in overruling the demurrer thereto.

[21] 2. We come now to the assignment that the court erred in overruling defendants' motion that the trial be had at Dayton. Section 100 of the Judicial Code divides Ohio into two judicial districts, Northern and Southern, and the Southern into two divisions, Western and Eastern. It provides that certain terms of the District Court for the Western Division shall be held at Cincinnati and certain for the Eastern at Columbus. Then follows this provision:

"Provided, That terms of the District Court for the Southern District shall be held at Dayton on the first Mondays in May and November. Prosecutions for crimes and offenses committed in any part of said district shall also be cognizable at the terms held at Dayton. All suits which may be brought within the Southern District, or either division thereof, may be instituted, tried, and determined at the terms held at Dayton."

This is a continuation or re-enactment of the act of March 4, 1907 (34 Statutes at Large, 1294), which first provided for the holding of terms of court at Dayton. This prosecution was instituted at Cincinnati. It is not claimed that the lower court abused its discretion, if, indeed, it had any, in overruling this motion, but that defendants were entitled as a matter of right to have the case transferred to Dayton for trial. The sole ground of the motion was that the National Company's plant and principal office is located there, and 11 of the defendants resided there, and that none of them resided at Cincinnati. We fail to find any basis whatever for this position. It will be noted that [627] Dayton is made a place for holding court for the entire Southern District. As to prosecutions for crimes and offenses committed in any part of the district, they "shall be cognizable," and as to suits which may be brought within the district—i. e., of which it has jurisdiction—they "may be instituted, tried, and determined" at Dayton. The provision that such prosecutions shall be cognizable at Dayton does not require that

Opinion of the Court.

they be instituted there; otherwise no prosecution could be instituted at Cincinnati or Columbus, but all would have to be instituted at Dayton. No more does it require that any prosecution instituted at Cincinnati or Columbus shall be transferred there for trial. The only possible question which can arise is whether any prosecution instituted at Cincinnati or Columbus can be transferred to Dayton. The original act provided for such transference of pending suits and nothing else. This assignment, therefore, is not well taken.

[22] 3. Chronologically the assignments calling in question the rulings on the admissibility of evidence come next. But we prefer to pass at once to the assignment that error was committed in overruling defendants' motion to direct the jury peremptorily to find a verdict for them. As introductory to its consideration, two things should be clearly understood. One is as to what, under the evidence, was the case which it was open to the Government to claim should be submitted to the jury. It was whether within the 3 years preceding the indictment the defendants conspired in restraint of the interstate trade or commerce in cash registers of the American Company of Columbus by the use of the fifth and ninth means specified therein. We make this out in this way: Certainly it was not more than whether the defendants within that time conspired in restraint of such trade or commerce of the competitors named who were in existence during the 3 years by any of the means specified. It did not include whether they at any time conspired against any other of the competitors named therein because, as they had ceased to exist prior to the 3 years, defendants could not have conspired against them within the 3 years, and, so far as they conspired against them prior to the 3 years, i. e., whilst they were in existence, as the prosecution therefor was barred by the statute of limitations, the indictment did not seek conviction for the conspiracy as to them. Nor did it include whether they at any time conspired generally, i. e., against all competitors, because whilst, as we have seen, the underlying thought of the first count is that they so conspired, and that this conspiracy was directed against the competitors named during and as they came into existence, the count did not seek conviction for such generic conspiracy.

Opinion of the Court.

Properly construed, it sought conviction for a conspiracy against the named competitors only, and those only who were in existence during the 3 years. And so far as such generic conspiracy existed prior to the 3 years the prosecution for it, too, was barred. It follows, therefore, that that case was not more than whether the defendants within the 3 years conspired in restraint of such trade or commerce of the American of Columbus, the Michigan, the Peninsular, the Burdick-Corbin, the Jewell, and the Dial by any of the means specified, for these were the only competitors who were in existence during the [628] 3 years. The Bensinger and Hopkins-Robinson were not in existence at any time within the 20-year period, the St. Louis is not mentioned in the evidence, the Bundy was not in the cash-register business, and all the others ceased to exist prior to the 3 years. The last of them to go out of existence was the Union, and it ceased to exist as a competitor November 1, 1906.

[23, 24] But the case was not even this much. It is not claimed by the Government that the generic conspiracy was ever directed against the Peninsular, the Burdick-Corbin, the Jewell, or the Dial. It only claims that it was directed against the American of Columbus and the Michigan. The American came into existence not later than the early part of 1907, and the Michigan in 1908. And, so far as the Michigan is concerned, there was no substantial evidence that such conspiracy was ever directed against it. There was evidence of but two acts which can be said to have been unfriendly towards it, only one of which was in the 3 years. They were directed not against it, but against two dealers in the machine, who purchased them outright and resold them. Its president and organizer, who had been connected with the National Company and who ceased his connection therewith in July, 1907, then holding the position of general manager, was one of the principal witnesses for the prosecution, and he made no complaint whatever of the National Company's attitude or action toward his company. Possibly the reason why the generic conspiracy, assuming that there was one, was never directed against these five companies, i. e., the Peninsular, the Burdick-Corbin, the Jewell, the Dial, and the Michigan, was because they did not seriously

Opinion of the Court.

endanger the National supremacy. And, in view of this, perhaps the generic conspiracy should be stated to be, not that it was against all competitors, but only against such as might endanger such supremacy. Such is the way, then, in which we limit the case which it was open to the Government to claim should be submitted to the jury to the American of Columbus. But we also limit it under the evidence as to the means to be used in accomplishing the object of the conspiracy against that competitor; i. e., to the fifth and ninth. It is not claimed that the defendants conspired to use the fourth means against any competitors. The first, second, and third means were not means to accomplish that object. They were not calculated, in and of themselves, to restrain the trade or commerce of any competitor. If no use was made of the information thereby obtained, no competitor would be restrained in his trade or commerce. Their sole function, therefore, was to enable the defendants to use other means which, in and of themselves, were calculated to restrain. It did not include the sixth, seventh, and tenth means, because there was no substantial evidence that the defendants at any time, much less within the 3 years, conspired in restraint of that company by the use of those means.

It may be assumed in this connection that there was substantial evidence that the generic conspiracy and the specific conspiracy against the competitors who ceased to exist prior to 1907 included the use of such means, but it does not follow that the conspiracy against the American of Columbus included the use thereof. There was not a [629] particle of evidence that any such applications for patents as are called for by the tenth item, or that threats to that company, or to any purchaser or prospective purchaser of its machines, to begin suits for infringement against it or him, called for by the sixth item, were ever made. But a single suit for infringement was ever brought. That was brought against that company itself in the District Court of the Southern District of New York in 1908. The National obtained therein a decree of infringement, which was reversed on appeal. *National Cash Register Co. v. American Cash Register Co.*, 178 Fed. 79, 101 C. C. A. 569. The patent was held in-

Opinion of the Court.

valid because of the sale of a single machine covered by it more than 2 years before its issue. The fact that the National was successful in the lower court is at least *prima facie* evidence of probable cause. The mere fact that there may have been a conspiracy—i. e., a joint purpose on the part of the defendants to restrain the trade of the competitors who ceased to exist before the year 1907 by the use of such means—is no evidence whatever that they had such joint purpose as to the American of Columbus, when during the 5 years of its existence preceding the indictment there was no manifestation of such purpose. The same is true as to the means covered by the eighth and eleventh items. We assume here, also, that there was substantial evidence that the generic conspiracy and the specific conspiracy against the competitors who ceased to exist prior to 1907 included the use of the means specified in the eighth item, and of other effective means not specified at all, but covered by the eleventh item. But there is not a particle of evidence that the defendants at any time within the 5 years of its existence contemplated the use of such means against the American of Columbus. And so it is that we limit the case which was open for the Government to claim should be submitted to the jury to whether the defendants within the 3 years preceding the indictment conspired in restraint of the interstate trade or commerce of the American of Columbus by the use of the means described in the fifth and ninth specifications.

[25] But in so limiting that case we are not to be understood as holding that the jury were not to consider at all whether the defendants conspired in restraint of the competitors named who ceased to exist prior to 1907 during their existence by the use of all the effective means specified except the fourth and of other effective means not specified covered by the eleventh item, and whether they were parties to a generic conspiracy of that character, and that evidence to this effect was not admissible. Our position is simply that those were subordinate issues in the case. The ultimate issue therein was whether the defendants had so conspired against the American of Columbus. The former issue had bearing

Opinion of the Court.

on the question whether there was a generic conspiracy, and the latter on the question whether there was a conspiracy against the American of Columbus when it came into existence, which continued into the 3 years. Our purpose in putting the matter thus is to bring out sharply just what was the ultimate issue in the case, after the close of the evidence. A clear understand[680]ing of this will aid us in disposing of the question in hand, and also the other questions yet to be considered.

It is, however, urged on behalf of defendants that the decision in the case of *Commonwealth v. Harley*, 7 Metc. (Mass.) 506, is against the consideration of a generic conspiracy in this case at all. It was there held that, under an indictment charging a conspiracy to defraud Stephen W. Marsh, evidence was not admissible of a conspiracy to cheat the public generally, or any person who might fall in the way of the conspirators. This was, however, on the ground—it could only have been on that ground—that the charge in the indictment excluded the thought of a generic conspiracy, and charged a conspiracy which in its origination was a specific conspiracy against Stephen W. Marsh. But that is not the case we have here. It is true that the indictment charges a specific conspiracy only, but it is not a conspiracy which was specific in its origination. In its origination it was a generic conspiracy, which became a specific conspiracy by being directed against the competitors named as they came into existence. Hence it was a pertinent question in the case whether there was a generic conspiracy during the 20 years, and there was no variance.

In the case of *People v. Gilman*, 121 Mich. 187, 80 N. W. 4, 46 L. R. A. 218, 80 Am. St. Rep. 490, a conviction was upheld under an indictment charging a conspiracy to defraud Edwin H. Sadler upon evidence of a conspiracy to cheat such persons as might be induced to attend certain seance meetings, and that he attended them. The decision is in conflict with the Massachusetts case, unless the indictment permitted the construction that it charged a specific conspiracy against Sadler by reason of a generic conspiracy being directed against him.

Opinion of the Court.

[26] So as to the first, second, and third means—the means which in and of themselves were non-effective—evidence tending to show that the conspiracy included them was admissible. And so far as there was substantial evidence to the effect that it did, it was for the jury to consider whether it did, but only as bearing on the further question whether it included, also, any of the effective means.

[27] The other thing which at this point should be clearly understood is whether, in order to there being such a case for submission to the jury, it is absolutely essential that anything was done in furtherance of such conspiracy within the 3 years preceding the indictment. We think that it is not. And this follows from Mr. Justice Holmes' illuminating and most helpful opinion in the case of *United States v. Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168. Before the decision in that case the question of the continuance of a conspiracy was in confusion and the authorities in conflict. There is no longer any confusion. The position there combated was that a conspiracy could not have continuance in time. It was urged that it could not, because it consisted in an unlawful agreement, and an agreement does not have continuance. That that was what it consisted in seemed to be justified by the common definition of a conspiracy as an agreement to do an unlawful thing, or to do a lawful thing by unlawful means. But this is no longer an accurate definition of a conspiracy. The agreement simply initiates the conspiracy, but it is not the whole of it. Mr. Justice Holmes said:

[681] "It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it."

And again he said:

"A conspiracy is constituted by an agreement, it is true; but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is the result of it. The contract is instantaneous; the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes."

Here we have an accurate definition of a conspiracy. It is "a partnership in criminal purposes," to which we might add, brought about by an agreement. So long, then, as the

Opinion of the Court.

partnership in a criminal purpose continues, the conspiracy continues. And it may continue without anything being done in furtherance of it. X and Y conspire on a day or two before the beginning of the period within which an indictment on a certain date may be found to murder Z, or to commit some other crime, on a day certain one week off; i. e., several days after the beginning of that period. After the beginning thereof, they abandon the conspiracy, either by a formal understanding or by allowing the day to go by without doing anything, and never renewing it. In such case the partnership in the criminal purpose continues into the period. In so far, then, as it continued into the period it was not barred by the statute of limitations. The mere fact that the prosecution for the agreement which initiated the partnership is barred is no reason for barring it as to so much of the partnership as has continued into the period. It may be important to show something done in furtherance of the conspiracy within the period to establish its continuance into it. It is not essential to its continuance thereinto.

We come, then, to the question whether the Government was entitled to a submission of such case to the jury. This depends on whether there was substantial evidence in support of that case. By substantial evidence we mean evidence fit to induce conviction. And in determining this we limit ourselves entirely to the Government's evidence, for it is not the province of the court, on a motion for a peremptory instruction, to weigh the evidence. That is for the jury only, except that it may be weighed by the court on a motion for new trial. *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 77 C. C. A. 625.

[28, 29] In order for the defendants to have so conspired it is essential that they had such connection with the National Company that in the performance of their duties they had to do with its competitors. Those of its officers and agents who had nothing to do with competition, as, for instance, those in the manufacturing department, can not be said to have so conspired. It is not sufficient to connect any officer or agent of the National Company with the conspiracy that they knew of it or acquiesced in it. They must by word

Opinion of the Court.

specified aimed to be covered by the eleventh item, and that when that company came into existence there was a generic conspiracy against all competitors, at least all who might endanger the National's supremacy, which generic conspiracy had been in existence at least from the beginning of the 20 years. In an issue of a publication of the company seemingly for distribution amongst its officers and agents, of date May 1, 1892, occur these statements:

"If the opposition knew what is in store for them, they would not waste any more time and money staying in the business. They are all beginning to realize that there is no hope for them."

"It is only a question of whether we propose to spend the money to keep down opposition. If we continue, it is absolutely certain no opposition company can stand against this company and its agents. If necessary, we will spend five times as much money as we have already done, in order to down opposition. If they really believe this, they will throw up the sponge and quit."

"We are receiving overtures to buy out opposition. We will not buy them out. We do not buy out; we knock out."

In an issue August 1, 1895, occurs this statement:

"We are determined to absolutely control the cash register business."

And in an issue of date March 25, 1897, after setting forth the policy of the company of frankly informing a competitor of the purpose to drive him out of business, occurs this statement:

"This, it is true, is what is called 'securing a monopoly'; but we think there can be no possible economic or other objection to it. Cash registers are not a necessity of life. Any one who chooses can do business without them, thus contributing nothing to the 'monopoly.'"

It is then stated that "this monopoly" "is managed upon a liberal and broad-minded plan." And at a convention of the district managers held at Dayton July 22, 1907, the defendant John H. Patterson, president, thus expressed himself to them:

"We want Mr. Anderson of the competition department to give you a little idea of how we are going to control competition. We want Mr. Hayward also to give you a little talk. We want Mr. Muzzy to tell you how we are going to absolutely control the competition of the world, because we want you to feel this way. The first thing we aim to do is to keep down competition."

Opinion of the Court.

[684] And again:

"I asked the Standard Oil Company what was the secret of their success, and they said this question could be answered in a very few words. Men, nothing but men; men well organized; they will keep down competition and make things succeed."

In the publications of the company and in the communications between the officers and agents having to do with competition, terms of warfare were not infrequently used, such as battle, fight, enemy, ammunition, shot, whipped, victory, and flags flying. During that time all the competitors named then in existence retired from the field. The American of Philadelphia, Boston, Hallwood, International, Hubinger & Carroll, and Latimer quit. The National does not seem to have been the cause of the Latimer quitting. The Century, Chicago, Cuckoo, Globe, Ideal, Kruse, Lamson, Metropolitan, Navy, Osborn, Standard, Simplex, Sun, Toledo, Union, and Weiler sold out to the National, and it discontinued their business. The American of Philadelphia and Boston quit because of infringement suits brought against them by the National in which it was successful. The decisions in its favor against them are *National Cash Register Co. v. American Cash Register Co.* (C. C.), 47 Fed. 212; *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367, 3 C. C. A. 559; *National Cash Register Co. v. Boston Cash I. & R. Co.*, 159 U. S. 261, 15 Sup. Ct., 1041, 40 L. Ed. 142. The result of this litigation may possibly have had something to do with other competitors quitting or selling out. Infringement suits were brought against most, if not all, the others, and these suits had more or less to do with their quitting or selling out. There was evidence tending to show in some of these instances at least that the claim of infringement was unfounded and known to be so, and that the suits for infringement were not brought in good faith, but for the sole purpose of aiding in driving the competitors from the field. The Government claims that such was the case in all instances. In most, if not all, of these instances, some, if not all, of the other means were resorted to, and it is not unlikely that in some instances at least they were more effective than the suits. And such means were resorted to

Opinion of the Court.

in some, if not all, the cases where the suits were successful. The Hallwood, International, Century, Chicago, Cuckoo, Globe, Ideal, Metropolitan, Navy, Osborn, Simplex, Sun, Toledo, Union, and Western retired from the field during the 7 years prior to 1907. Most, if not all, of the others retired before then, and mainly in the early part of the 20-year period.

In justice to the National Company and the defendants it should be noted that it was the pioneer in the cash register business and developed it. It owned the basic patents and must have acquired in a proper manner a very great number of improvement patents. In addition to this, it had the advantage of very great capacity in the management of its affairs. These two considerations together, without reference to any unfair treatment of its competitors, are sufficient in themselves to account in a large measure for the success it has attained. And it is not unlikely that its trade was pirated by other competitors besides the American of Philadelphia and the Boston, against whom it obtained [635] decrees of infringement, and that these, as well as others, in their competition with it, resorted to some of the tactics complained of here.

We think it clear, also, that there was substantial evidence to the effect that this generic conspiracy was directed against the American of Columbus when it came into existence, and became specific as to it, and that it continued up until just shortly before the beginning of the 3-year period. The only other competitors then in existence were the Peninsular, Burdick-Corbin, and Dial, neither of which, as stated, was of much consequence. That company was the successor of the International, and it in turn of the Hallwood. The Hallwood during its existence, which covered a number of years, was one of the National's most stubborn competitors. It went into the hands of a receiver in 1903 or 1904. There was evidence tending to show that an effort was made, whilst its assets were in such hands, by the National, to acquire them without its being known in the transaction. The International acquired them, and then the American. Its connection with the Hallwood not unlikely aided it in getting established in business soon after entering the field. So iden-

Opinion of the Court.

tified with the Hallwood was it that its machines were frequently called Hallwood, and it, sometimes, the Hallwood Company. In view of its connection with the Hallwood Company, one would expect the generic conspiracy to be directed against it as soon as it came into existence, and so the Government's evidence tended to show. May 4, 1907, the district manager at Detroit, Henry F. James, wrote to the assistant head of the competition department, Joseph E. Warren, that the Hallwood (i. e., American) situation in Detroit looked rather serious, and suggested the employment of the plaintiff in error Alexander W. Sinclair, then off the roll, to hire the Hallwood agent at that point. Warren answered that the competition did not warrant placing Sinclair on the roll again, and suggested that he (James) was in a better position to hire the agent than Sinclair. There was no evidence of anything else of a specific character during this year. But there were general statements as to competition which could not have had reference to any one but the American. Such was the statement of plaintiff in error John H. Patterson, at the convention of district managers July 22, 1907. June 20, 1907, the general manager, Hugh Chalmers, wrote to all the sales agents and salesmen, suggesting that they call on the users of competing machines and point out to them the weaknesses and deficiencies thereof, so that, even if they could not make a trade, they would cease to be a "plugger" for the opposition. And September 6, 1907, the head of the competition department, C. D. Anderson, wrote James at Detroit that the company was never in better shape to take care of competition than at that time, and for that reason they did not intend to let it increase again.

March 1, 1908, the plaintiff in error Sinclair entered the employ of the American and located at Detroit. It is possible that he was then still off the National's roll. He continued in its employ there until September 24, 1908. During this time a vigorous effort was made to drive him from the field, and it finally succeeded, when he reentered the National's employ as a company salesman, and so continued until [636] the trial. The plaintiffs in error Pflum, then general manager, Harned, then executive secretary, and Watson, then sales manager, participated in this effort. The method

Opinion of the Court.

After Sinclair returned to the service of the National, he was sent to Toledo, Ohio, where he remained at least until in November, 1908. Whilst there he adopted the same tactics that had been used against him in Detroit to drive out the agents of the American at that point. Finally, in the middle of January, 1909, James, the district manager at Detroit left the service of the National, and in breach of a contract that he had with it at once entered the employ of the American and was placed in charge of several States, with headquarters at Detroit. In the early part of February, 1909, certainly not as late as the 22d of that month, the new district manager appointed to take the place of James at Detroit was installed. At a meeting of the sales agents and salesmen who were to be under him, held on that occasion, the plaintiff in error Watson was present and undertook to outline the policy [637] of the National in meeting competition, and in the course of his remarks, according to one witness, he said that it would be necessary to use every means possible to put James out of business, and according to another that they did not want him to get a foothold in Detroit, and that they would move their executive offices to Detroit, but that they would put him out of business.

Thus it is that the Government's evidence tended to establish a conspiracy on the part of some of the defendants at least against the American, and brought it down almost to the door of the 3-year period. It remains to consider whether there was substantial evidence to the effect that it entered that door. Possibly in view of the fact that the American was still actively in business—that what had transpired preceding the 3 years down almost to it indicated an absolute and fixed purpose to restrain the trade of the American, if not to drive it out of business, without any indication of a change of purpose before the 3 years—and that the American was represented at Detroit by the National's former representative, against whom it had a grievance, it was for the jury, without more, to determine whether the conspiracy continued into the 3 years. But the case does not depend upon presumptions. Things were done within the 3 years by representatives of the National in restraint of the American's trade and commerce. According to the defend-

Opinion of the Court.

answer, referred to a drawer-operated machine parallel to the Hallwood (i. e., American), which the National was making for the purpose of fighting the American therewith. The Government's evidence tended to show that a machine known as 1,000-line machine, and which not unlikely was this machine, was used only for the purpose of fighting the American and keeping it from making sales within the 3 years. If so, this could hardly be without some of the defendants being connected with it. The Government's position here was combated strongly by the defendants, but we cannot weigh its evidence on this point as against that of the Government. For these reasons, therefore, we think the case was for the jury, and the court did not err in overruling all the motions. It is not the province of an appellate court to weigh the evidence. What the trial court might do on a motion for new trial as to some of the defendants, in the view which we have taken of the nature of the offense charged, we need not pause to consider.

4. It is now in order to take up the assignments questioning rulings upon the admissibility of evidence. They are very numerous, but the consideration of them can be shortened by classification. In considering them, the case for the jury, as we have determined it to have been, should be kept constantly in mind. That case is whether within the three years the defendants conspired in restraint of the trade of the American of Columbus, by the use of the fifth and ninth means. No evidence that was not relevant thereto was admissible, and all that was was admissible, if not otherwise objectionable. The primary classification of these rulings is into those involving evidence that was admitted and those where the evidence was excluded. We consider first those where the evidence was admitted. In this connection it may be said generally that the admissible evidence was not confined [640] to that which bore directly upon the existence of such conspiracy within the 3 years. All that was not otherwise objectionable tending to show the existence of a generic conspiracy when that company came into existence and its fixed and absolute character was relevant and admissible. Likewise as to all evidence tending to show that

Opinion of the Court.

upon its coming into existence the generic conspiracy was directed against it specifically and continued down to the beginning of the 3 years.

The admitted evidence involved in the rulings covered by the assignments relates to transactions within the 3 years and to transactions prior thereto as far back as the beginning of the 20 years. Here we consider first that which relates to transactions within the 3 years. And that may be divided into the evidence of the acts in restraint of the American trade, heretofore referred to, evidence of an act against that company, not heretofore referred to, and evidence of acts against the Michigan and Dial companies.

[32] All of the evidence of acts against the American, heretofore referred to, was objected to, and the rulings admitting it are assigned as error. It is urged that none of those acts come within the means specified in the indictment, and that the eleventh item is insufficient, under the authority of the case of *United States v. Greene* (D. C.) 115 Fed. 343, 346. We think, however, that they fairly come within the fifth and ninth. Greater stress is made on the consideration that it was not shown that any of the defendants were connected with any of those acts. It is true that there was no direct evidence of such connection, apart from the use of the 1,000-line machines; but this circumstance did not render evidence of those acts inadmissible. The Government would base its admissibility on the doctrine of respondeat superior. It cites the cases of *United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693; *Cliquot's Champagne*, 3 Wall. 114, 18 L. Ed. 116; and *Stockwell v. United States*, 13 Wall. 531, 20 L. Ed. 491, where it was held that:

"Whatever is done by an agent in reference to the business in which he is at the time employed and within the scope of this authority is said or done by the principal, and may be proved as well in a criminal as in a civil case in all respects as if the principal were the actor."

But this doctrine can have no application here, as the persons who did the acts—i. e., sales agents and salesmen—were not the agents of the defendants. They were the agents of the National Company. They were under defendants, but this did not make them defendants' agents. It urges further

Opinion of the Court.

that they were co-conspirators with defendants, and under the case of *Clune v. United States*, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269, what one conspirator does is evidence against the other, even though he is not a defendant or charged with being a party to the conspiracy in the indictment. Possibly this is sufficient to uphold the action of the court in admitting the evidence. But it is not necessary to rely on it. All the acts were done in the regular course of the business of the National Company. Those sales agents and salesmen were under the direct supervision of some, at least, of the defendants. There was substantial evidence that [641] prior to the 3 years the defendants were in a conspiracy to restrain the trade and commerce of the American of Columbus by causing such acts to be done, and the sole question was whether that conspiracy had continued into the 3 years. The doing of those acts was relevant to that issue. It was not an unreasonable inference that they were to be accounted for by the continued existence of the conspiracy. Possibly they are to be accounted for by the initiative of the sales agents and salesmen in their anxiety to make commissions or as mere sequelæ. But it was for the jury to determine how they were to be accounted for as between those three possible ways of doing so. The defendants contend that is a case of an inference upon or from an inference, and that this is not allowable under the cases of *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707, and *Manning v. Insurance Co.*, 100 U. S. 693, 25 L. Ed. 761. That is a case of an inference upon or from an inference is attempted to be made out by tracing the course of inference in this way. An inference is first drawn that the sales agents and salesmen acted upon the instructions of the National Company, and then the further inference is drawn that defendants were connected with such instructions. This case does not involve any such question. It is a case of immediate inference. The course of inference is not as claimed, but from the acts done to the conspiracy as the cause thereof. The court, therefore, did not err in admitting the evidence.

[33] The evidence of an act against the company not heretofore referred to was as to something that happened in

Opinion of the Court.

connection with one of the attempts on the part of the National's sales agents and salesmen to induce purchasers of American machines to repudiate their contracts of purchase, to wit, the attempt as to Conrad Green & Sons, of Portland, Oregon, in the latter part of 1910. The agent of the American, who made that sale, left its employ the latter part of March, 1911, and entered that of the National. Evidence was admitted that after the delivery of the machine it was noticed to be out of order. The American agent made repeated attempts to fix it, but it remained out of order until he quit its employ. After he left, his successor, a repairman, who with the agent had examined the machine before its delivery and found it to be in perfect condition, examined it again and found that it was out of order because a piece of its mechanism was bent. The Government's position was that the American agent had bent it, at the National's instance. There was no other evidence that the National had any other connection with the matter than that the American agent entered its employ four or five months afterwards and one of its competition men was seen in his store about three weeks before he did so. We do not think the evidence was sufficient to connect any National agent with the defective condition of the machine. There was no evidence of any other such act having ever been committed or attempted against the American. We, therefore, hold that there was error here.

[34, 35] The acts against the Michigan and Dial, evidence of which was admitted, were these: A salesman of the National attempted to induce a dealer in Michigan cash registers, who bought them out[642]right from the Michigan Company and resold them, to discontinue the business by threats of interference. A similar transaction to this took place prior to the three years, i. e., in 1908. As to the Dial in one instance an agent of the National happening in the office of that company when an acquaintance was there negotiating for some of its stock advised him not to buy it; and in another the plaintiff in error Muzzy attempted to purchase the business or patents of the company which was unsuccessful. We think the court erred in admitting this evidence. The Government does not contend that the evi-

Opinion of the Court.

[37] Nor do we think the objection to certain of this evidence that it did not relate to transactions coming within the means specified well taken. The ruling of the court in refusing to require a bill of particulars of the means intended to be covered cannot be questioned here and the indictment was quite liberal in the matter of specification. Besides, the case for which the defendants were subject to conviction was limited to means specified, to wit, fifth and ninth. The [643] question here is whether in establishing the generic conspiracy—a fact relevant to the existence of the specific conspiracy covered by that case—the Government was limited to the means specified as to competitors who ceased their existence prior to 1907. The tendency of the use of other means than those specified was to establish that the generic conspiracy was to use every possible wrongful means that might be effective in putting an end to competition.

[38] Special emphasis is made upon the assignments which call in question rulings admitting evidence concerning the purchase of the businesses of 16 competitors by the National prior to 1907, and how the purchases came about. But all this evidence was admissible. Its tendency was to establish a generic conspiracy to compel competitors to sell out to the National by the use of any effective wrongful means in existence when the American came in the field, and the tendency of such generic conspiracy is to establish a specific conspiracy against the American when it came into existence, which continued into the 3 years, at least to restrain its trade and commerce, if not to compel it to sell out to the National, by the use of the fifth and ninth items. It is true that, at the time of these purchases, suits for infringement were pending against most, if not all, of these competitors. If such suits were brought in good faith and were the cause of the competitors selling out, then the tendency of that evidence was not to establish such a generic conspiracy. The case of *Virtue v. Creamery Package Company*, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. 393, was an action for treble damages under the seventh section of the Anti-Trust Act for a conspiracy in restraint of the plaintiff's interstate trade by prosecuting suits against them for infringement of patents

Opinion of the Court.

and circulating reports that his articles were an infringement thereof. Two suits for infringement had been brought, in one of which infringement was denied and in the other decreed. In connection with those suits such reports were circulated. It was held that no recovery could be had. Mr. Justice McKenna said:

"Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal. Patent rights, it is true, may be asserted in malicious prosecutions as other rights * * * may be. But this is not an action for malicious prosecution. It is an action under the Sherman Anti-Trust Act for the violations * * * of that act, seeking treble damages."

He did not mean by that that no recovery could be had under that act for damages caused by a conspiracy in restraint of interstate trade by the malicious prosecution of suits for infringement. He meant no more than that it did not appear that there was any such conspiracy in that case. So far as appeared, both suits were brought in good faith.

But here there was evidence tending to show that suits were not brought in good faith, and, on the contrary, were an "illicit use of the courts as instrumentalities of oppression," condemned in the case of *Commercial Acetylene Co. v. Avery Portable Light Co.* (C. C.), 152 Fed. 642. Besides, there was evidence tending to show in certain of the cases, at least, that the bringing of the suit was not [644] the real cause of the competitors selling out, but the use of other wrongful means. In addition to this, in each case of purchase it was made a provision in the contract that the competitor should not engage in the cash register business for 20 or 25 years, except one or two States in the West, where the cash register business was not large, which evidenced the purpose to keep competitors out of the business. This circumstance made what is known as the Leland contract, settling litigation growing out of the suit against the Boston Company, in which the National was successful, admissible in evidence. After the end of that suit the National brought suits against certain officers of the Boston to recover damages. In the case of *National Cash Register Co. v. Leland*,

Opinion of the Court.

present at the convention. Two objections are made to that evidence. One is that both were copies, and the originals should have been produced or accounted for. The other is that the evidence of what took place at those conventions was hearsay. The first ob[645]jection was not made in the lower court. That raised by the other was that before the minutes were read in evidence their accuracy should have been guaranteed, either by the persons who made them or by others who were present at the conventions. Strictly speaking, the objection that the evidence was hearsay raised this question. But the objection should have been more specific. It should have been expressly urged that such guaranty should be made before admitting the minutes in evidence. It might have been furnished. Because of this, if any error was committed in admitting these minutes in evidence, it cannot be considered.

[41, 42] This brings us to the assignments questioning rulings excluding evidence offered by the defendants. That mainly complained of is the rejection of evidence offered to prove that the National owned unexpired patents covering the machines made and sold or offered to be sold, by the 16 competitors whom it bought out, by the Hallwood, International, and Hubinger & Carroll, which quit business, and by the American of Columbus, during the times they were in existence, which machines, therefore, infringed those patents. According to this offer, all the competitors who ceased business prior to 1907, and the American of Columbus, against whose trade and commerce defendants are charged with conspiring, were infringers of the National's patents, and in so conspiring they were but seeking to prevent them from doing that which the National had a right to have them refrain from doing. We are not much impressed with the good faith of the offer as to the American. The conduct of the National and its managing officers during the five years of its existence preceding the indictment seems to belie it. During that time no suit for infringement was brought against that company, except the one heretofore referred to, and there is no indication that they then thought that it was liable to such suit. It is not likely that they

Opinion of the Court.

ing the infringing article, no assaults are made upon his person, so that there is no room for claiming that his action was in self-defense. And the infringer owns his factory and articles. The patentee may be entitled to a destruction of the infringing articles through the process of the court, but not otherwise. But has he the right to prevent him from so doing by action outside of the courts, not involving an invasion of the rights of person or property of the infringer; i. e., by the use of means which would be wrongful if used by him to prevent another from selling articles not covered by his patent—i. e., such means as are charged here?

We are not concerned here with the question as to what a patentee may himself do in a general way to protect the substantive right which he has from invasion. The question in hand is whether he and another, or his officers and agents in his interest, may conspire to prevent an invasion of his rights in the interstate field by the use of any such means. This depends solely on whether such a conspiracy is within the first section of the Anti-Trust Act. And it would seem that to ask this question is to answer it. The terms of the section are of a most sweeping character. It includes every conspiracy in restraint of interstate trade or commerce. It is not a question whether it is rightful or wrongful interstate trade or commerce that is covered by the conspiracy. It is sufficient that it is interstate trade or commerce. If two or more persons in no way interested in a patent were to conspire in restraint of the interstate trade or commerce of an infringer, no one would contend that the conspiracy was not covered by the statute. No more is it open to contend that a conspiracy by a patentee and another, or by the officers and agents of a patentee in his interest, to restrain the interstate trade or commerce of an infringer, is not within the statute. The intent of the statute was to sweep away all conspiracies in restraint of such trade or commerce, whatever their character may be. The statute respects the monopoly of the patentee. It to no extent invades the rights conferred upon him by his patent. *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *United States v. Winslow*, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481. But the right to conspire with [647] another or others in his interest in restraint of the interstate

Opinion of the Court.

istence, the defendants were parties to a generic conspiracy in restraint of the interstate trade or commerce of all competitors who might endanger the supremacy of the National by the use of any effective means, of which a conspiracy against the American of Columbus by the use of the fifth and ninth means, which continued into the 3 years, was the outgrowth.

Now, as bearing on that question, we think that the defendants were entitled to prove, if they could, that the machines of those competitors were infringements. The means covered by the seventh item were in effect malicious prosecutions against those competitors—the bringing of suits for infringement, not in the belief that the National had a good cause of action against them, but without regard to whether it had or not—in order to drive them from the cash register field; i. e., in bad faith or without probable cause. A suit for malicious prosecution cannot be brought until the termination of the prosecu[648]tion. In such a suit, therefore, it is never a question whether there was real cause for the prosecution. Its dismissal settles the question whether there was real cause. But it is a question therein whether there was probable cause. The suit cannot be maintained if there was. But here there was no termination of the suits for infringement, by a decision of the question of infringement involved therein. In most instances the suits were terminated by settlement. The question, therefore, whether there was real cause for bringing them, is still an open question. And if there was real cause for their bringing, they were not malicious prosecutions—they were not brought in bad faith. If in an ordinary suit for malicious prosecution it is a good defense that there was probable cause for the prosecution, so here the claim that these infringement suits were brought in bad faith is met by showing that there was real cause for them, in that the competitors were infringers of valid unexpired patents held by the National. The defendants were not limited to showing that the National acted on the advice of counsel in bringing the suits. They had the right to show, if they could, that such suits were based upon valid patents against real infringers. It is true that the effect of this is to bring into this prosecution a considerable number of patent suits as it were. But the Government

Opinion of the Court.

has brought them here by charging in the indictment that defendants conspired to drive these competitors from the cash register field by maliciously bringing suits for infringements of patents against them, and introducing evidence to that effect. We think, therefore, that the evidence was admissible, and that there was error in excluding it.

[44] It is also urged that the court erred in excluding evidence of competitive tactics and aggressions on the part of the National's competitors, offered by defendants. As we make it, this evidence related only to the Hallwood, the American's predecessor, and to Steubenrauch, the American's Connecticut sales agent; the conduct of the latter happening within the 3 years. We think this evidence was admissible. The relevancy of the Government's evidence as to a conspiracy against the Hallwood was in its bearing on the existence of a generic conspiracy and its character. The tendency of the evidence as to its competitive tactics and aggressions against the National was to make out that, in so far as there was a conspiracy against the Hallwood, it was due to provocation. Provocation, therefore, was a possible element in the generic conspiracy, and, if so, the fact of there having been no provocation on the part of the American, the remote successor of the Hallwood, would make it open to contend that the general conspiracy was never directed against it. It is in this way that it seems to us that the evidence as to the conduct of the Hallwood bore on the question whether there was a conspiracy against the American. Then, as to Steubenrauch's conduct: The tendency thereof was to show that the conduct of the National's sales agent complained of was due to that conduct, and not to a conspiracy on the part of defendants against the American.

[45] Finally, the exclusion of the letters of plaintiffs in error High and Snyder to the plaintiff in error Pflum, of date, respectively, April [649] 5, 1909, and April 6, 1909, in answer to his circular letter of April 1, 1909, to the district managers, heretofore quoted in full, are assigned as error. In those letters these two plaintiffs in error stated

Opinion of the Court.

that the policy therein outlined had been pursued in their districts. We think the letters were admissible in evidence. They were written nearly 3 years before the finding of the indictment, and were a part of the *res gestæ*. *Hibbard v. United States*, 172 Fed. 66, 70, 96 C. C. A. 554, 18 Ann. Cas. 1040; *Harrison v. United States*, 200 Fed. 674, 119 C. C. A. 78; *Gould v. United States*, 209 Fed. 730, 126 C. C. A. 454. If there was anything in the circumstances then or theretofore existing affecting their good faith, they were for the jury to consider, just as it was for them to determine the good faith of the Pfum circular.

5. It remains to consider the errors assigned in connection with the charge to the jury. But few exceptions were taken to the charge which was given, and no assignment of error in this connection has been argued. We therefore pass these exceptions by. The court submitted all three counts to the jury. The defendants requested that the jury be instructed to find them not guilty on the second and third. In accordance with our holding as to the sufficiency of these two counts, the defendants were entitled to have the jury so instructed. The first count alone should have been submitted to them.

[46] The court clearly told the jury that the defendants could not be found guilty under that count unless they had conspired within the 3 years. This, of course, limited the case upon which they could be so found to competitors in existence during the 3 years. But defendants were entitled to have the jury instructed specifically that they could not be found guilty as to the competitors who ceased to exist before 1907. They asked specific instructions to this effect. These instructions were given as to 6 of them. They should have been given as to the other 20. That such instructions were given as to 6 made it more prejudicial that they were not given as to the other 20.

[47] The defendants also requested that the jury be specifically instructed that they could not be found guilty as to each of the 6 competitors who were in existence during the 3 years. They were not entitled to the instruction as to the American of Columbus. They were entitled to the instruc-

Opinion of the Court.

tion as to the other 5. There was no substantial evidence that within the 5 years defendants had conspired as to either of those 5 competitors. The instructions as to the Burdick-Corbin and Jewell were given. Those also as to the Peninsular, Dial, and Michigan should have been given. The defendants further requested that the jury be specifically instructed that they could not be found guilty of having conspired within the 3 years in restraint by the use of each of the 11 means specified. They were so instructed as to the fourth. They were entitled to have it instructed also as to the sixth, seventh, eighth, ninth, and eleventh. Whilst, as we have held, the first, second, and third means were non-effective, without more, and the evidence as to the conspiracy within the 3 years including either of those means was slight, yet such as it was the jury was entitled to consider in connection with that bearing on the fifth and [650] ninth means, and no instructions should have been given which could be construed as excluding that evidence. That it is reversible error to submit to the jury the question whether the conspiracy in question includes means of which there is no evidence follows from the decision in *Nash v. United States*, 229 U. S. 373, 83 Sup. Ct. 780, 57 L. Ed. 1232. The grounds upon which we hold the court erred in not giving the specific instructions indicated appear in what we have had to say on defendants' right to a peremptory instruction. The giving of them would have presented sharply to the jury the only ultimate question before it, to wit, whether within the 3 years the defendants conspired in restraint of the interstate trade or commerce in cash registers of the American of Columbus by the use of the fifth and ninth means specified.

[48-50] The defendants also requested the giving of three instructions embodying certain general propositions as to what it was not unlawful for the defendants to do in their several capacities as officers and agents of the National, to wit:

(1) "To require the agents of their company to report the names of persons who had purchased cash registers from competitors, or

Opinion of the Court.

to secure samples of machines from time to time put on the market by competitors."

(2) "To sell or offer and try to sell National cash registers to persons who had bought and owned competing cash registers in exchange at such price as was satisfactory to the parties."

(3) "To compare by comparative demonstrations or otherwise competitive cash registers with National cash registers, for the purpose of demonstrating the superiority of the National cash registers, and thereby induce the prospective purchaser to purchase the National cash register."

No objection can be made to the last proposition, but the other two were too broad. They need qualification. It was unlawful for defendants to do as stated in the second proposition, if the doing thereof involved the purchaser and owner of the competing cash register breaking his contract with the competitor in any particular, or was done for the purpose of driving the competitor out of the cash register field. One competitor has the right to try to sell by fair means all of his goods that he can, and if the effect of his selling is to drive another competitor out of the field he is not to blame. But it is wrong for one competitor to want to drive another competitor from the field by unfair or illegal means, and to take steps to that end, so that he may have the field free from such competition and thereby be enabled to sell his goods.

Then, as to reporting purchasers of competing registers and securing samples, it all depends on the manner in which the information in the one instance and the samples in the other were obtained or secured. If in a proper manner, nothing unlawful was done.

We do not deem it necessary to consider the other requests asked and refused.

We are constrained, therefore, to reverse the judgment of the lower court and remand the case for a new trial and further proceedings consistent herewith.

Opinion of the Court.

the act of Congress of July 2, 1890, known as the "Sherman Anti-Trust Act" (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). The suit was for damages alleged to have been sustained by the plaintiff below, the defendant in error here, by reason of an unlawful agreement on the part of the defendant companies and Augustus Craft, who, it is also alleged, conspired to injure the People's Tobacco Company in its business. There was a verdict and judgment for the plaintiff.

It is unnecessary to go into the character of the action or the questions involved on the merits of the case to any great extent, because the recovery in the district court as to the liability and the amount is not questioned here. The judgment, which recites the amount of the verdict, and is for three times the amount of the same and for counsel fees, is as follows:

"Considering the verdict of the jury rendered in this cause on March 30, 1912, wherein the jury found in favor of the plaintiff and against the defendants, in solido, in the sum of \$8,728.06, and considering the law in such cases made and provided (act of Congress approved July 2, 1890), it is ordered, adjudged, and decreed that the plaintiff, the People's Tobacco Company, do have and recover of and from the defendants, the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company, Limited, in solido, the sum of \$26,184.18, being three times the amount of the said verdict rendered on March 30, 1912, by the jury herein, together with interest thereon at the rate of 5 per cent per annum from the date of this judgment. It is further ordered, adjudged, and decreed, in accordance with the act of Congress as aforesaid, that the plaintiff, the People's Tobacco Company, do have and recover of and from the defendants, the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company, Limited, in solido, the sum of \$5,000 as reasonable attorney's fees herein allowed by the court to plaintiff in this cause. It is further ordered, adjudged, and decreed that said defendants be condemned to pay all the costs of this suit."

[60] The only question made on this writ of error is whether the suit was brought in time, the defendants pleading the prescription of one year under the law of Louisiana, and it is conceded that that is the prescribed time for such actions in Louisiana.

Opinion of the Court.

knows that he has suffered an actionable injury. That does not mean that it would begin to run if he merely knew his profits were falling off, or he knew they were falling off from the competition of the Craft Tobacco Company; but it would begin to run if he knew that the falling off or damage was caused by the competition to effect and in pursuance of an illegal combination in restraint of trade. In other words, from the moment he knew he could bring an action against somebody to recover his damages, although he might not have known who the person was, or he might not have known how he was going to prove his action, prescription would run, and after the lapse of one year his right of action would be barred. Therefore it is a question of fact for you to determine, in connection with this case, whether or not the plaintiff knew, or ought to have known, more than a year before this petition was filed, that he had suffered an actionable injury. The petition was filed on the 30th day of January, 1908, the citation was served the same day on all the defendants, and the allegation in the petition is that he did not know of this combination or its operation against him until the 10th of December, 1907, which, of course, is within one year. [61] So, if you find the allegation in his petition is correct, and it not offset by the evidence, or not disproved by the evidence, you will pay no further attention to the question of prescription."

Taking this charge as a whole, we think it fairly presents the question of prescription in this case. The particular language which we think renders the charge sound, if it is otherwise subject to criticism, is this:

"Therefore it is a question of fact for you to determine, in connection with this case, whether or not the plaintiff knew, or ought to have known, more than one year before this petition was filed, that he had suffered an actionable injury."

The court then proceeds to state that the petition was filed in January, 1908, and that the plaintiff alleges he did not know of the combination and its operation against him until December, 1907, clearly indicating, and saying to the jury, and so they must have understood, that if the plaintiff knew, or could have known, more than a year before the filing of its petition, of this unlawful combination against it, the plea of prescription would be good. The view of the court, as indicated by the charge, was that prescription did not begin to run until the People's Tobacco Company knew, or ought to have known, of the agreement or arrangement

Opinion of the Court.

called "a combination or conspiracy" on the part of the other tobacco companies against it. While it might have known that its profits were falling off, and that the competition of the Craft Tobacco Company was causing this, this could not give it a cause of action under the provisions of the Sherman Law, and until it discovered that it had a right of action prescription would not commence to run. We think this states substantially the law of the case, and is the correct view of the question of prescription.

Much of the argument here has been directed to the question as to whether the maxim "contra non valentem agere non currit prescriptio" is now a part of the jurisprudence of the State of Louisiana. The decisions of the Supreme Court of Louisiana are conflicting, and there might well be doubt, under those decisions alone, as to what is the correct view of this. In *Levy v. Stewart*, 11 Wall. 244, 20 L. Ed. 86, however, which was a case from Louisiana, reference is made in the opinion by Mr. Justice Clifford to the law of Louisiana on this subject, and especially to the maxim "contra non valentem," etc., as follows:

"Recent decisions of the Supreme Court of the State are referred to by the defendant, in which it is denied that any exception whatever is allowed in any case, in the law of prescription, as to bills and notes. None of those decisions are founded upon any express enactment, and the reasons assigned for the conclusion are not satisfactory. They admit that the maxim 'contra non valentem agere non currit prescriptio' is a maxim of universal justice, but deny that it applies to causes of action founded upon bills and notes, chiefly because 'they are prescriptible against minors and interdicted persons as well as others,' which the chief justice of the court, in the case first cited, held to be an unsatisfactory reason for the conclusion, and in that view the court here entirely concurs."

This would seem to indicate that the Supreme Court of the United States recognizes the correctness of those decisions of the Supreme Court of Louisiana which consider this maxim still a part of the jurisprudence of that State.

[62] In *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636, in the opinion by Mr. Justice Miller, this is said:

"In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that

Opinion of the Court.

where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party."

Afterward in the opinion the following is added:

"But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded on a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side."

This case of *Bailey v. Glover* has since been frequently recognized in decisions by the Supreme Court and other United States courts. In *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467, the court, in discussing the question involved here as to the suspension of the statute of limitations, where the facts on which the case was based had been concealed, said (115 U. S. 538, 6 Sup. Ct. 159, 29 L. Ed. 467):

"The case of *Bailey v. Glover* has never been overruled, doubted, or modified by this court."

Many other authorities to the same effect might be cited, but the foregoing are considered sufficient to establish the principle which must control here.

Opinion of the Court.

It is stated in this case, however, that the question of fraud or concealment of facts upon which the case is founded was not made in the District Court, or presented to the jury by the court. We do not think this material here. The fact of a combination and conspiracy between the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company had already been established in this case, and also the amount which the plaintiff was entitled to recover, embracing threefold damages and attorney's fees. The judge, in his charge, fixed the time when prescription should commence to run as the date of the discovery of the fact of the concerted action by the two defendant companies and Craft. It must be borne in mind that the course of the wrongful conduct, injurious to the plaintiff, was all this time concealed from the plaintiff, and this conduct and this concealment must necessarily be considered as a fraud on the plaintiff. The court, in its charge, evidently assumed that, if the jury had found that the plaintiff was not entitled to damages, it would be unnecessary for it to consider the question of prescription at all. Indeed, such is indicated in the charge itself. But if it found damages for the plaintiff, making the consideration of the question of prescription necessary, then they would have already found such conduct on the part of the defendants as would amount to a fraud on the plaintiff, and all it was then necessary for it to consider was when the plaintiff first ascertained the facts which formed the basis for the charge of fraud.

It is said, however, that the only purpose for concealing the connection between the American Tobacco Company and Augustus Craft and the Craft Tobacco Company was that the American Tobacco Company was on the "unfair list" of organized labor, and that if its connection with the Craft Tobacco Company became known it would bring about a boycott by union labor of the Craft Tobacco Company. The fact of the concealment of the combination between the American and the Craft Tobacco Companies and Craft is none the less a concealment, as we see it, so far as the suspension of the running of the statute against the People's

Syllabus.

person or persons to monopolize, any part of the trade or commerce within the several States, or with foreign nations, shall be guilty of a misdemeanor. *Held*, that the phrase "engage in such combination or conspiracy," in section 1, was used in a broad sense, and included, not only such persons as initiated such a conspiracy, but also those who afterwards engage therein; and hence an indictment, charging that defendants were engaged in a conspiracy among themselves to control and monopolize interstate commerce in the manufacture and sale of coaster brakes among the several States, followed by an allegation of overt acts tending to effectuate the conspiracy, was not defective for failure to charge directly the formation and existence of the conspiracy, the words "engage in," as so used, signifying to embark in, take part in, or enlist in, meaning substantially the same thing as to conspire.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 31)—COMBINATION IN RESTRAINT OF TRADE—INDICTMENT—LAWFUL PURPOSE.—Where an indictment for violation of Sherman Anti-Trust Act, July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), charged that defendants were engaged in a combination and conspiracy to monopolize and control the trade in and manufacture and sale of coaster brakes in the United States, and that for this purpose defendants, in combination with an association, had committed certain specified acts tending to restrain competition among themselves, including the assignment of pretended patent license rights, tending toward the establishment of uniform prices for the products, and an agreement between them for non-competitive discounts to jobbers, dealers, etc., all of which were alleged to have been done with an unlawful intent to control the market, the indictment was not defective, on the theory that the acts charged were in perfect harmony with a lawful purpose.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 31)—SHERMAN ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF TRADE—PATENT RIGHTS—INDICTMENT.—In a prosecution of manufacturers of coaster brakes for combination in violation of Sherman Anti-Trust Act July 2, 1890, c. 647 §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), certain counts of the indictment alleged that defendant, the N. D. Company, was the owner of a basic patent for making such brakes, and issued licenses to manufacture thereunder, charging, however, that the defendant corporations were separately the owners of patents and patent rights for improvements in the coaster brake and other bicycle and motor cycle accessories, but that the defendants, to effectuate their plan

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Syllabus.

to restrain trade, feigned the making of a license agreement ostensibly covering a part, but not the whole, of the coaster brake manufactured by the N. D. Company, charging that the pretended license agreements, which were to be entered into simultaneously by the N. D. Company as ostensible licensor with the remaining corporation defendants as ostensible separate licensees, were to be in all respects uniform in character, were to contain schedules of uniform and non-competitive prices, restrictions upon all sales, etc. *Held*, that such averments negatived an inference that the licenses were for a basic patent, but that the conditions were imposed on competitors in good faith and without an intention to violate the statute, since the fact that patents are issued to various persons or corporations, does not entitle them to combine to restrain the manufacture or sale of the patented article or to enhance prices in restriction of commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

STATUTES (§ 47)—VALIDITY—DEFINITENESS—SHERMAN ANTI-TRUST ACT.—Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), providing that every contract, combination, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is illegal, and that every person who shall make such contract or engage in such combination or conspiracy shall be guilty of a misdemeanor, and that every person or persons who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, shall be guilty of a misdemeanor, is not unconstitutional because of indefiniteness.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.]

INDICTMENT AND INFORMATION (§ 87)—TIME OF OFFENSE—LIMITATIONS.—Where an indictment, charging a conspiracy in restraint of interstate trade or commerce in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), alleged that defendants continuously, during the period from July 1, 1907, to January 8, 1912, committed the unlawful acts specified, it sufficiently alleged that an offense was committed within the three-year statute of limitations.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.]

INDICTMENT AND INFORMATION (§ 99)—COUNTS—INCORPORATION OF PREVIOUS COUNTS—REFERENCE.—It is proper to incorporate in a subsequent count by reference facts alleged in a previous one.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. § 99.]

Opinion of the Court.

Indictment against the New Departure Manufacturing Company and others for alleged violation of sections 1 and 2 of the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Demurrer to indictment overruled.

See, also, 195 Fed. 778.

John Lord O'Brian, of Buffalo, N. Y., for the United States.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y., *Gross, Hyde & Shipman*, of Hartford, Conn., and *Holmes, Rogers & Carpenter*, of New York City (*Delevan A. Holmes*, of New York City; *Wm. Waldo Hyde*, of Hartford, Conn.; *Lyman M. Bass*, of Buffalo, N. Y., and *Louis E. Hart*, of Chicago, Ill., of counsel), for defendants.

[109] HAZEL, District Judge.

The defendants, the New Departure Manufacturing Company and 5 other corporations and 18 individuals, have been indicted in eight counts for the violation of sections 1 and 2 of the Sherman Anti-Trust Act, passed July 2, 1890 (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), being charged with unlawfully engaging in a conspiracy in restraint of interstate trade and commerce among the several States and foreign nations, and with attempting to monopolize such interstate trade and commerce.

The indictment, to which the defendants have demurred, after charging in general terms that the corporation defendants were separately engaged in different States in the business of manufacturing bicycle and motor cycle coaster brakes and accessories, of a distinctive type and design from those manufactured and sold by any other of the corporation defendants, under certain letters patent and certain patent license rights owned by them separately, alleges that the individual defendants were officers of the said corporations, vested with power and authority to do and perform the unlawful acts and purposes of the conspiracy, with the

Opinion of the Court.

jobbers, and deal[110]ers; (3) by selling the manufactured product at non-competitive prices, rebates, and discounts largely in excess of the prices which would have prevailed if the defendants had not engaged in the conspiracy; (4) by refusing to sell coaster brakes except on the terms and conditions agreed upon by defendants; (5) by agreeing upon a form of contract with prospective buyers; (6) by refusing to sell products to any manufacturer or jobber not agreeing not to deal in similar products manufactured by others; (7) by instigating patent litigation, or threatening with prosecution dealers in the commodity of a competitor; (8) by devising a pretended license agreement, under which the New Departure Manufacturing Company was to act as ostensible licensor, and the other corporation defendants as licensees, for the manufacture and sale of said coaster brakes and accessories under patents claimed to be owned by the former, and covering only parts thereof; (9) by entering at the same time into license agreements whereby the licensor agrees not to grant additional licenses without the consent of the licensees; (10) by granting uniform licenses containing schedules of non-competitive prices, discounts, and restrictions on sales to outside dealers; (11) by the discontinuance of pending litigation between the various defendants, and agreement not to question the validity of any patents owned by licensees; (12) by the payment of pretended royalties to the New Departure Manufacturing Company, which were credited back in return for the use of other letters patent; (13) by arranging for the deposit with an arbitrator of a guaranty fund to insure against breach of license agreement between licensor and licensees, and for the settlement of all disputes arising among the defendant corporations by said arbitrator; (14) by agreeing upon arbitrary non-competitive prices for the sale and resale of coaster brakes and accessories by jobbers, and by agreement to sell only to listed jobbers as per arrangement; (15) by giving discounts only to such manufacturers and jobbers as the defendant corporations should jointly sanction; and (16) by carrying on litigation against competitors, and by preventing members of the combination from selling to competitors.

The general claim of the Government is that it was the purpose and intention of the defendants to discourage and destroy competition by intimidation and coercion, by the institution of litigation against infringers of patents, and by the pretense of a basic license arrangement, running exclusively to the defendant corporations, binding each to a strict observance of the selling prices of the manufactured product, future prices, restrictions on sales to jobbers, retail dealers, and customers, etc.

Opinion of the Court.

Defendants contend that the indictment is fatally defective because it fails to charge, first, the formation of a conspiracy in violation of the act under consideration, as an averment that the defendants "are engaged in a conspiracy among themselves" to accomplish an unlawful end is not the equivalent of a direct charge of the formation or existence of a conspiracy; second, that the act is too indefinite to sustain a criminal prosecution; and, third, that the facts upon which the Government relies are equally as consistent with a lawful agreement to restrain interstate trade and commerce as with an unlawful agreement.

[1] With respect to the asserted failure to charge a conspiracy, there was considerable discussion at the bar; it being contended, *inter alia*, that the existence of the conspiracy cannot be shown by the averment of the commission of overt acts. Sections 1 and 2 of the Federal Anti-Trust Act read as follows:

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with [111] foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The first part of section 1 states that every contract, combination, or conspiracy in restraint of trade or commerce among the several States is illegal, while the sentence following is declarative of the character of the offense. Was it necessary to directly charge the existence or formation of a conspiracy upon which to base an accusation that the defendants engaged in a combination or conspiracy? The quoted provision is perhaps not as clearly expressed as it might be; but I think the phrase "engage in such combination or con-

Opinion of the Court.

were to be fixed and controlled, assuming the truthfulness of the averment as to the grant of a pretended license, possesses an ingenious intermingling of various business interests, which no doubt justifies the conclusions of the indictment that the intention was to discourage and destroy competition and to attempt to create a monopoly.

In the *Bath-Tub Trust case*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 117, so called, a case recently decided by the Supreme Court of the United States, a situation somewhat similar to this in respect to quantity of output and license agreement was presented, and the court said:

"The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the coöperation of 85 per cent of the manufacturers. * * * The agreements therefore clearly transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman Law."

The Supreme Court then pointed out the distinction between that case and the case of *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; but nevertheless the intimation in the opinion is clear that the monopoly secured to the patentee by the issuance of a patent cannot be designedly used to form a combination or conspiracy between manufacturers and dealers to accomplish a restraint of trade such as the Anti-Trust Act prohibits. Upon this subject the Circuit Court of Appeals for the Third Circuit, in *National Harrow Co. v. Hench et al.*, 88 Fed. 36, 27 C. C. A. 349, 39 L. R. A. 299, has aptly said:

"The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by [114] them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that only the patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges."

Opinion of the Court.

The language quoted was cited with approval by Judge Coxe in *National Harrow Company v. Hench et al.* (C. C.) 84 Fed. 226.

In *Blount Manufacturing Co. v. Yale & Towne Mfg. Co.* (C. C.) 166 Fed. 557, of the patentees' privilege of combining their patent rights the court said:

"Where, however, each patentee continues to make his own goods under his own patents, and seeks to enhance his profits by agreement with creditors who make either patented or unpatented articles, then it seems to follow that the agreement of each to restrain his own trade cannot be regarded merely as an incident to the assignment of patent rights. The patentee then restrains his own trade, not for the purpose of enhancing the value of the license which he grants, but for the purpose of enhancing the value of his trade by removing competition."

So here, as claimed by the Government, the license agreements were resorted to as a subterfuge to aid in stifling competition in trade and commerce, and to enhance the value of the respective businesses of the defendant, and to create a monopoly in their productions. In *Sanitary Manufacturing Co. v. United States* (the Bath-Tub Trust case) the Supreme Court clearly supports the view that patentees' rights are limited by the Anti-Trust Act, as the following excerpt from the opinion shows:

"Rights conferred by patents are, indeed, very definite and extensive; but they do not give any more than other rights a universal license against positive prohibitions. The Sherman Law is a limitation of rights—rights which may be pushed to evil consequences, and therefore restrained."

[4] It is next objected that the Sherman Act is unconstitutional; but as to this ground of demurrer it is enough to say that since the hearing, or just prior thereto, Judge Hollister, in *United States v. Patterson* (D. C.), 201 Fed. 697, expressly held to the contrary, and stated in his opinion that, prior to his passing upon the constitutionality of the act, it had already been held constitutional by Judge Angel sitting at the trial of the Bath-Tub Trust case, by Judge Hand in the Sugar Trust prosecution, and by Judge Putnam in the Shoe Machinery Trust case (*United States v. Winslow* [D. C.], 195 Fed. 578). As such decisions are in complete accord

Opinion of the Court.

with my own views, I am persuaded that the Anti-Trust Act as a criminal statute is a valid enactment.

[5] It is further objected that the offenses are not averred to have been committed within three years, and criticism is made of the phrasing "during said period" in the indictment; but as it is also alleged that the unlawful acts were committed by the defendants "continuously during a period of time from the 1st day of July, 1907, to the present 8th day of January, 1912," the time is stated within the [115] statutory limitations with sufficient definiteness. *Glendale Woolen Mills v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309.

[6] The seventh and eighth counts, which aver an attempt to monopolize the business carried on by the defendants, are also criticized as being too vague, uncertain, and indefinite. This objection has already been sufficiently answered by what has been said in passing upon the preceding counts. It was not improper to incorporate therein by reference the facts specified in counts 1, 2, and 3. *Crain v. United States*, 162 U. S. 634, 16 Sup. Ct. 952, 40 L. Ed. 1097; *Blitz v. United States*, 153 U. S. 315, 14 Sup. Ct. 924, 38 L. Ed. 725.

Assuming, then, as we must, that all the facts and circumstances as summarized herein are true, it is thought to be plainly shown that the continuation of such acts by confederation or concert of action on the part of the defendants tends towards the creation of a monopoly in the manufacture of the specified articles. Indeed, by the methods and acts complained of, the commingling of separate interests in separate patent rights, by the issuing of a pretended license for a pretended basic patent, with the intention of fixing uniform prices and discounts and imposing other conditions, benefits, and advantages were secured which may be enjoyed only by a separate patentee in the protection of his true monopoly. It was such courses of procedure by industrial interests in whatever form or guise that the Anti-Trust Act was designed to check and prevent.

The demurrers are overruled on all grounds, and the defendant corporations and individuals are required to plead to the indictment at this regular term of court.

Opinion of the Court.

Action by Charles R. Hale and others against the Hatch & North Coal Company and others. A judgment was entered in favor of defendants by direction of the court, and plaintiffs bring error. Reversed.

Ralph M. Grant and *Josiah H. Peck*, both of Hartford, Conn., and *James A. Marr*, of Bridgeport, Conn., for plaintiffs in error.

Henry Stoddard, of New Haven, Conn., and *Hyde, Joslyn, Gilman & Hungerford, J. Gilbert Calhoun*, and *John J. Dwyer*, all of Hartford, Conn., for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge.

This action is brought under the Sherman Law (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), the seventh section of which gives a private individual, whose business is injured by any of the acts forbidden by the law, or declared unlawful thereby, the right to sue therefor and recover threefold damages. The act declares contracts, combinations, and conspiracies in restraint of trade or commerce among the several States, illegal. It also provides that every person who shall monopolize or combine or conspire with any other person to monopolize interstate commerce, or make a contract or enter into a combination or conspire in restraint of trade, shall be guilty of a misdemeanor. For several years after October, 1903, the plaintiff, Charles R. Hale, had been engaged at Hartford, Conn., in buying and selling coal mined in States other than Connecticut. A large part of this coal was mined in Pennsylvania and was the subject of interstate commerce.

The defendants were coal dealers of Connecticut, having a place of meeting at Hartford where they frequently met. The plaintiff had built up an increasing business and had received a contract to supply the city with coal, for which he had underbid the other dealers. Soon thereafter he found it impossible to get coal from wholesale dealers, who

Opinion of the Court.

not only refused to supply him, but in one instance, at least, canceled an order already accepted. Parties to the alleged conspiracy endeavored to persuade dealers outside of Hartford not to furnish him with coal. Other parties endeavored to persuade him to join the combination. The final result was that the plaintiff was forced into bankruptcy.

[435] During the comparatively short period in which Hale had been engaged in buying and selling coal he succeeded in building up a flourishing and steadily increasing business until he was successful in procuring the contract with the city in competition with the defendants. Then his troubles began; difficulty after difficulty confronted him, obstacle after obstacle was placed in his path; the result being, as before stated, failure and bankruptcy. We have, then, a successful and growing coal business destroyed. A large number of local dealers whose interests were hostile to those of Hale. Inability on Hale's part to purchase coal except at ruinous prices.

In looking for the causes responsible for Hale's ruin, we naturally turn to those persons who were being injured by his success, viz, the local coal dealers of Hartford. It appears that they rented a room in the Hartford Trust Company building where they held meetings, that they met there and elsewhere under circumstances indicating secrecy. It also appears that several of the members openly expressed the opinion that Hale's conduct was demoralizing the price of coal in Hartford. One of the witnesses testified that the secretary of the Hartford Coal Dealers' Association, and a defendant, stated to the witness that "they had an association that was holding up the price of coal; and that everybody was in it with the exception of Mr. Hale."

Without considering the entire testimony which points to the defendants, or some of them, as the parties responsible for the destruction of Hale's business, we think enough has been stated to make it clear that the question was one of fact which should have been submitted to the jury. It is true that the evidence is to a large extent circumstantial. The defendants did not write out and formally pass a reso-

Syllabus.

nopolize, or attempt to monopolize, or conspire with any person to monopolize, any part of such trade or [579] commerce, was not unconstitutional for indefiniteness in so far as sought to form the basis of a criminal proceeding.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.]

INDICTMENT AND INFORMATION (§ 99)—INCORPORATION BY REFERENCE.—The rule applied that later parts of an indictment may incorporate the details of matters properly set out in the earlier parts by reference, subject, however, to the rule that duplicity and repugnancy must be avoided.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. § 99.]

MONOPOLIES (§ 10)—RESTRAINT OF TRADE—STATUTES—CONSTRUCTION.—Sherman Anti-Trust Act (act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) is subject to the rule that statutes are not to be interpreted to change the common law except so far as a purpose to do so is necessarily implied; therefore it is *held*, that the act was not intended to prohibit those minor contracts in partial restraint of trade which the common law had affirmed as reasonable, but was to be construed in accordance with the common law, developed along reasonable lines in accordance with modern commercial advance.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.]

MONOPOLIES (§ 20)—COMBINATION IN RESTRAINT OF TRADE—NON-COMPETING INDUSTRIES.—Combination of several corporations, each selling or leasing machinery intended for different operations, not competing, but supplementing each other, does not ordinarily constitute a monopoly in restraint of trade.

[Ed. Note.—For other cases, see Monopolies. Dec. Dig. § 20.]

For other definitions, see Words and Phrases, vol. 5, pp. 4570–4574.]

COMMITTEE OF PRIVY COUNCIL—DECISIONS—CONCLUSIVENESS—MONOPOLIES—DEMURRER.—The business of the United Shoe Machinery Company is conducted by a system of leases, which are substantially the same as those described in *United Shoe Machinery Company v. Brunet* [1909] App. Cas. 330. It is claimed in these indictments that the provisions of these leases are unreasonable, and unlawfully operate to build up the alleged monopoly of the United Shoe Machinery Company. It is claimed by the respondents that *United Shoe Machinery Company v. Brunet* should be applied here, and that in harmony therewith the leases in question here should be declared valid. *United Shoe Machinery Company v. Brunet* was decided by a very able court, yet it was a decision of the judicial committee of the Privy Council, and therefore not authoritative as the decisions of the established courts of Great Britain. Independ-

Opinion of the Court.

ently of these considerations, the pleadings in these indictments do not permit us to so apply on this demurrer *United Shoe Machinery Company v. Brunet* to such extent as to support the demurrer.

Sidney W. Winslow and others were indicted for violating the Sherman Anti-Trust Act. On demurrers to indictments. Sustained in part and overruled in part.

Asa P. French, U. S. Atty., *Edwin H. Abbot, Jr.*, Sp. Asst. U. S. Atty., *William S. Gregg*, Sp. Asst. Atty. Gen., *James A. Fowler*, Asst. Atty. Gen., and *Oliver E. Pagan*.

Charles F. Choate, jr., of Boston (*Olcott O. Partridge*, of Boston, on the brief), for defendants Winslow, Hurd, and Brown.

Henry F. Hurlburt and *Boyd B. Jones*, for defendants Barbour and Howe.

William A. Sargent, of Boston, for all defendants.

[580] PUTNAM, Circuit Judge.

[1] These cases came before us on demurrer. They are indictments based on the act of July 2, 1890 (26 Stat. 209, c. 647), commonly known as the "Sherman Anti-Trust Act." No. 114 seems to be less complicated by special circumstances than No. 113. We will therefore take up that first. It contains two counts. The first is based on the second section of the act referred to, relating to monopolies, and the second on the first section, which declares illegal certain contracts and combinations or conspiracies in restraint of trade, and punishes "every person who shall make any such contract or engage in any such combination or conspiracy." The second section of the act impliedly permits an indictment for building up a monopoly, as well as inaugurating it or maintaining it, and therefore may relate to a series of acts following each other, all covered into one indictment or count, without the indictment or count being chargeable with duplicity. The offense under the first section permits in one count an allegation of only a

Opinion of the Court.

single transaction—that is, an allegation of making one contract, or engaging in one combination or conspiracy—so that while by virtue of the decisions of the Supreme Court in *United States v. Kissel*, 218 U. S. 601, 607, 31 Sup. Ct. 124, 54 L. Ed. 1168, and *United States v. Barber*, 219 U. S. 72, 78, 31 Sup. Ct. 209, 55 L. Ed. 99, such a combination or conspiracy, when once effected, may be continuous, yet only one contract or one conspiracy can properly be alleged in any one count. For this reason, as we go on, we will find that the second count, under the circumstances of the case, must be held invalid in law.

There is such a chaos of decisions in reference to the Sherman Anti-Trust Act, and such a chaos of understanding or misunderstanding with reference thereto, and this case apparently is regarded as of so important a character, that any conclusions a single judge may reach may prove of very little importance. It is not for the court here to judge of the possibility of a writ of error lying in these cases to the Supreme Court, but it is hoped by the court that such may be permissible. The court, moreover, cannot overlook the fact, in accordance with the practice shown in *United States v. N. Y., N. H. & H. R. Co.* (C. C.) 165 Fed. 742, decided on December 4, 1908, that the United States, under the act approved February 11, 1909 (32 Stat. 823 [U. S. Comp. St. Supp. 1909, p. 1211]), have the privilege of demanding, on a bill in equity, the constitution of a court of three judges to pass on the issues fundamentally involved here; of course, much broadened out and made much more certain as they would be on a bill in equity. Also, the court, having a right to know its own records, cannot overlook the fact that such a bill in equity is pending in this district, subject to be advanced for hearing in accordance with the statute last named. Nevertheless, the court, being appealed to as the parties have a right to appeal to it, must do its duty as best it can.

[2] It will turn out that, notwithstanding the apparent conflict, and as we say chaos, of decisions, there is a clear path through them all to a satisfactory determination of the fundamental question involved here. It may be found, however, that certain incidental matters are proposed as to

Opinion of the Court.

As the theory of the latter case has never been approved, we will not refer to it further; but the former case, *Oliver v. Gilmore*, deserves some consideration, as we will state later.

[3, 4] The incidental questions we will dispose of now. It is objected that the respondents are joined as officers of various corporations around which this litigation gathers, that one corporation is the principal, and that the respondents are only officers or directors thereof. The indictment, however, expressly charges them as actors, and two fundamental principles are thoroughly settled. One is that neither in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present, and efficient actor; and the second is that all parties active in promoting a misdemeanor, whether agents or not, are principals. The rule distinguishing between directors of a corporation who are simply charged as such and directors acting an immediate, special part in the proceedings in question, was pointed out and settled by the Circuit Court of Appeals for this circuit in *National Cash Register Company v. Leland*, 94 Fed. 502, 508, 509, 37 C. C. A. 372. Although that was a civil suit for damages on account of an infringement of a patent right, the principles apply here as well as there.

[5] Some questions are also made with reference to the method of setting out certain documents involved here. There are a great many documents all of the same class relied on by the United States. None of them is specifically described, nor any allegations beyond describing the substance thereof as understood by the United States. We may return to this later if we find it necessary; but all we need say at present is that, where whatever are involved are so numerous that they cannot be stated at length, or in detail, without incumbering the record to an extent beyond all practical rules of convenience, they may be stated generally. Also, as ruled by the Circuit Court of Appeals for this circuit in *Pooler v. United States*, 127 Fed. 509, 517, 62 C. C. A. 307, and by the Circuit Court in *United States v. Grunberg* (C. C.) 131 Fed. 137, 139, it is not ordinarily necessary to

Opinion of the Court.

must be stated in detail to enable the court to determine for itself whether or not the alleged combination or conspiracy is to be carried out by what are in truth unlawful methods. We think as we leave this case it will be free from all objections in the latter behalf.

It was claimed at the arguments that there is not a sufficient allegation establishing the jurisdiction in this district; but it is plainly inferable from all that is stated in the indictment that the formation of the conspiracy was within this district. This topic, as thus presented to us, is within section 954 of the Revised Statutes (U. S. Comp. St. 1901, p. 696), and is so far a matter of form that it should have been specially set out in the demurrer. Whether it was or not has not been brought to our attention.

It is also said that the United Shoe Machinery Company, the organization which lies at the basis of these indictments, was created under the laws of New Jersey, and that certain allegations with reference to its organization in the State of Massachusetts are repugnant; but the criminal law is not hampered by considerations of this character, and it looks through all such forms, regarding them rather as possibly ineffectual evasions.

[7] Also a question of constitutionality is raised on the ground that what is known as the Sherman Anti-Trust Act is too indefinite to lay the foundation of a criminal proceeding. It is true that the Constitution of the United States requires that, in all criminal prosecutions, the accused "shall be informed of the nature and cause of the accusation" (amend. art. 6), and that this applies, not merely to the information or indictment, but to the statutory provisions on which the proceeding is based. It must not be forgotten that the framers of the Constitution of the United States and of the earlier State Constitutions lived at a time when the recollection of the cruelties of tyrannical proceedings, and the suffering and injustice coming therefrom, were fresh, and, to a large extent, topics of consideration, and when the provisions of constitutional law necessary to protect against such had been thoroughly thought out. In this aspect the framers of these constitutions were vastly more alive to the necessity of provisions

Opinion of the Court.

of the kind we have quoted, and other like provisions, than the present generation. The favorite resources of tyrants were punishing alleged crimes which had no existence prior to the punishment, and arresting and holding in imprisonment for indefinite periods, and afterwards forfeiting both property and life, without furnishing those charged any knowledge of the charges laid against them; and the same men who framed these constitutions soon learned from immediate contact with the bloody revolution in France that, for all injustice and cruelties, excited or prejudiced multitudes are more pitiless than monarchs, emperors, czars, and all individual tyrants. Consequently, looking at the experience of our forefathers more than at our own, it is the duty of courts and of communities to stand firm in behalf of constitutional provisions such as we have quoted, and more especially in behalf of those dividing the [584] Government into departments as an absolute preventative against those who make charges, and prosecute them, becoming directly or indirectly the judges. We have lived in so much peace for more than a century under the protection of the constitutional provisions to which we refer that whole masses of citizens and some of their leaders are slumbering in reference to them, while our forefathers, who were brought into almost immediate contact with all the devices to which tyranny was accustomed, were fully awake. The courts, however, are not permitted to slumber. We nevertheless know of no case where statutes have been so general or loose as to have been held to violate the constitutional provision on which the respondents here rely. Moreover, the facts are supposed to be known to the respondents. They are chargeable also, according to the usual assumption of law, with knowledge of the law. Therefore, the facts being alleged in detail in the indictment, the respondents are supposed to be advised fully of what is intended to be charged against them. Certainly it is not so plain that the statute so violates the Constitution as to justify us in holding it unconstitutional in the absence of any adjudication by the Supreme Court.

Nevertheless, while in theory the respondents are chargeable as we say, yet, in fact, the practical application of this

Opinion of the Court.

the United States in attempting to bring before us exactly the facts as they exist, or as they claim them to be, and we think they have done so. We may, however, as well say it now, that we must reject the third count in indictment 113. That count, with certain general statements, describes the pith of the alleged offense as follows:

"And under the circumstances and conditions in said first and second counts set forth with reference to said trade and commerce and the subjects thereof (the allegations of said first and second counts in that behalf, including the allegations as to knowledge, intent, and design on the part of said defendants, and as to methods adopted and used by them, being by reference incorporated into this count of this indictment as fully as if herein repeated)."

[8] Modern practice fully justifies references in the later parts of an indictment to earlier parts of the same indictment for the details of matters properly set out in the earlier parts, and this has been correctly done with reference to the second count in indictment 114; but this practice is subject to the fundamental rules of pleading that duplicity and repugnancies must be avoided. The trouble here is as follows:

We have studied the first and second counts in this indictment with the view of ascertaining the necessity of the second count and wherein it differs from the first count; and we have been unable in what study we have given them to analyze them with certainty in this respect. They are apparently looking generally to the same circumstances, so that all we have been able to do is to adopt the explanation of the United States in its supplemental brief in this respect. It alleges that the facts in the second count are substantially similar to those set out in count 1, with such changes as were necessary to charge a conspiracy to restrain the interstate trade of shoe manufacturers by restricting their liberty of purchase in the shoe machinery markets. The arguments at the bar, however, as well as the supplemental brief for the United States, give us the understanding, as in fact it is stated in that brief, that the merger described in the first count created a combination which improperly restrained the defendants themselves in the management of their respective portions of interstate commerce. Consequently the references to the first two counts inevitably in-

Opinion of the Court.

letter of the section. Therefore, neither in determining the matters involved in this litigation nor in weighing the authorities pro and con can any distinction be made in that behalf. Nevertheless, in the other particulars, with reference to the letter of the statute, it is inevitable that there should be some qualification which does not appear on its face. Otherwise, contracts in restraint of trade, and also monopolies, which have always been regarded as innocent and useful, would be denounced to an extent which would demoralize commerce and utterly defeat the very purpose for which the statute was intended; that is, to advance commerce, and not to destroy it. Restraint is often mere regulation or temporary obstruction for the purpose of clearing out the channel, and letting the stream flow at full tide. In these particulars the law is not prophetic as to the results of what merchants and manufacturers propose, except so far as it can learn from experience; and in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315, already cited, the Supreme Court approved a contract which created a complete monopoly, so far as could then be foreseen, of steam navigation along the whole coast of California, and approved a contract restraining that trade for a specific number of years. This was an emphatic illustration of the condition of things which the Sherman Anti-Trust Act found; and the case demonstrates what mischief it might do if interpreted literally. Other examples in the same direction are always close at hand. *Oregon Steam Navigation Company v. Winsor*, *ubi supra*, contained several, including the suggestion at foot of page 67 of 20 Wall. (22 L. Ed. 315), in reference to portioning out the country in regard to a secret [587] formula, a suggestion carried into practical effect in *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67. *Oliver v. Gilmore*, already cited, and which we have said was based on *Oregon Steam Navigation Company v. Winsor*, is more abundantly illustrative, and attempts to classify. It is interesting in its description of the development of the law given by Lord Justice Fry, than whom no one in England knew it better, although it must be said that we have not advanced in the United States so far as the famous *Mogul* case (54 L. J. Q. B. 540).

Opinion of the Court.

[9] Independently of this, there is the well-settled rule that statutes are not to be interpreted to change the common law, except so far as a purpose so to do is necessarily implied. As said by Mr. Justice Brewer with reference to this same statute in *Northern Securities Company v. United States*, 193 U. S. 197, 361, 24 Sup. Ct. 436, 466 (48 L. Ed. 679), decided March 14, 1904:

"Whenever a departure from common-law rules and definitions is claimed, the purpose to make the departure should be clearly shown."

In fact, this rule of construction is so universally recognized, and so fundamental, that we need only call attention to it in this connection. The contrary understanding seems to have been a long time cultivated as a result of what appears in connection with *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, decided March 22, 1897, although it is sometimes said that that understanding was only the reporter's law, in view of the headnote stated as follows:

"The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable."

In this case of nine judges only five concurred in the result, one of whom was Mr. Justice Brewer; so that, at the best, the conclusion was that of only five judges against four. But Mr. Justice Brewer, in connection with the expression we have cited from him, vigorously maintained that, although he united with the majority in the Freight Association case, the statute in question was leveled only at unlawful restraints and monopolies; and he added that:

"Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable, and ought to be upheld."

He continued:

"The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon these contracts which were in direct restraint of trade, unreasonable, and against public policy."

Then follows what we have previously cited from him.

Opinion of the Court.

Then follows a number of specifications, among which is this:

"By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for purposes of trade."

We have examined every decision of the Supreme Court bearing on these topics. Some of them, like *Gibbs v. Gas Company*, 130 U. S. 396, 409, 9 Sup. Ct. 553, 32 L. Ed. 979, already referred to, and the *Freight Association case*, 166 U. S. 290, 335, 17 Sup. Ct. 540, 41 L. Ed. 1007, were decided, or might have been, on the ground that they involved agreements for the suppression of corporations having a public character, which agreements are clearly illegal all over New England. All the other decisions involved a well-known rule which prohibits stifling bids and portioning out territory arbitrarily. In this is included *Oregon Steam Navigation Company v. Winsor*, already cited, with reference to the excess period of three years explained therein. None of them penalize a combination like that originally formed in the present case. Therefore we cannot adjudge it invalid.

The first count of indictment 114 reaches the case of an alleged completed monopoly, which, therefore, may include everything, not only the original combination, but whatever occurred down to the time of the finding of the indictment. There are numerous minor matters here which are not covered by either of the two propositions which we have said were specially brought forward in the supplemental brief of the United States; as, for example, the acquiring the "Thomas G. Plant" assets, and several minor corporations. These are only the results, and of themselves add nothing except by way of illustration and aggravation.

What was thus referred to in the supplemental brief of the United States are leases which are declared to be "arbitrary, oppressive, and unreasonable." The alleged illegal purpose of the leases is set out [594] at full length, and they are denounced as unlawful devices for eliminating competition. It is also urged that, as a result of these leases, in

Opinion of the Court.

guage found in any edition of Archbold's Criminal Pleading, as follows:

"At common law, written instruments, wherever they formed a part of the gist of the offense charged, must be set out verbatim."

Nowhere is it attempted to apply this rule, except with the limitation thus stated. Both the examples given by Archbold, and by other authorities, and what the courts learn by experience in the practical application of this rule, should satisfy any one that the instruments referred to in this petition do not form a part of the gist of the offense charged. Moreover, the petition overlooks the fact that there is another rule which we applied, which is that the multiplicity of the instruments to which the indictment refers rendered it impracticable to plead them except in a general way.

The other alleged error to which the petition relates is that the first count of the indictment No. 114 so far developed rights covered by letters patent as to bring the case within *Henry v. Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, decided by the Supreme Court in the opinion handed down on March 11, 1912. The only point there decided was to affirm a rule with reference to rights of patentees which has been accepted by us since the topic came under discussion; and, as we understand, is as is generally held in this circuit. The line of reasoning in the opinion perhaps develops propositions which may or may not be available for the respondents in defense on a trial of issues of fact, if there is one, under the count indictment No. 114, to which the petition relates, but they are not available on the face of that count.

It ought to be enough to say that at the hearing on the demurrers, to which it must be admitted we gave patient attention, it was not submitted to us that this count in indictment No. 114 showed that the respondents had any peculiar rights or defenses arising out of the patent laws. Even this petition makes a clear distinction between this indictment and the indictment No. 113. This is not only in accordance with our recollection of the presentation of the case when brought before us, to which it must be admitted we

Opinion of the Court.

gave the most careful attention; but also it is sustained by one of the briefs for the respondents submitted at that time, wherein, with reference to indictment No. 113, it was stated that all the machines referred to therein were expressly alleged to be covered by letters patent, while the same brief, with reference to indictment No. 114, stated only that its allegations led almost conclusively to the establishment of the proposition that the business was based on patents. According to the fixed rules of criminal pleadings, matters "expressly alleged" and those allegations which lead "almost conclusively" are so wide apart that they are not in the same field at all.

Indictment No. 113 alleges expressly again and again that specific machines are covered by letters patent. On this point the petition before us invites us, at large, to examine five pages, 26, 27, 28, 29, and 30, in indictment No. 114, and again three pages and again four pages, leaving us to search out what the respondents rely on. This is calling on the court for an abuse of time which counsel of the distinction and experience of those at bar should never have done. The court refuses to undertake the task, beyond turning up page 26 referred to, where there is a general charge that the corporation controlled by the respondents acquired "assets and letters patent" without any further specification. As far as the court recollects, there is nothing more definite anywhere in indictment No. 113. This, of course, is not effectual on the proposition now brought before us; and this distinction between No. 114 and No. 113 clearly justifies us in holding that there was no intention at the trial of these demurrers to bring before us the proposition now made. The respondents at that trial had their hearing and their full day at court, and must be content therewith.

On the whole, we repeat that we left the indictment as to which the respondents now complain in the condition which we described in our reference to *Kansas v. Colorado*, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838; and we are not willing to be turned aside from that position by any further discussion. We must in any view deny the petition.

Syllabus.

UNITED STATES *v.* WINSLOW.*

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MASSACHUSETTS.

No. 620. Argued January 10, 1913.—Decided February 3, 1913.

[227 U. S., 202.]

On appeals under the Criminal Appeals Act of 1907 this court has no jurisdiction to review the interpretation of the indictment by the lower court, *United States v. Patten*, 226 U. S. 525, and if that court has construed the count as alleging a combination of a particular date to be in violation of the Sherman Law, without regard to subsequent acts, this court cannot pass upon the validity of those acts.^b

A combination for greater efficiency does not necessarily violate the Sherman Anti-Trust Act.

Where each of several groups are carrying on a legal business of making patented machines which do not compete with each other, although the machines of all the groups are used by manufacturers of the same article, such as shoes, a combination of the several groups does not violate the Sherman Anti-Trust Act.

Exclusion of competitors from making the patented article is of the very essence of the right conferred by the patent.

Where the share in interstate commerce does not appear in the record, and the machines in question are not alleged to be types of all the machines used in manufacturing the article for which they are made, the Government cannot claim that a specified proportion of the business was put into a single hand.

The disintegration aimed at by the Sherman Anti-Trust Act does not extend to reducing all manufacture to isolated units of the lowest degree.

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, is a special provision and, as it is not mentioned in the repealing section of the Judicial Code of 1911 and is not superseded by any other regulation of the matter, it was not repealed by the Judicial Code. *United States, Petitioner*, 226 U. S. 420.

The District Court rightly held that the counts under review of the indictment against various persons for combining their businesses of [208] manufacturing patented machines for making different parts of shoes, and not competing with each other, did not constitute an offense under the Sherman Anti-Trust Act.

195 Fed. Rep. 578, affirmed.

* For opinion of District Court, sustaining, in part, demurrers to indictments (195 Fed. 578), see *ante*, page 170.

^b Syllabus and statements of arguments copyrighted, 1913, by The Banks Law Publishing Company.

Argument for the United States.

pendents that a shoe manufacturer had 24 different choices for obtaining shoe machinery.

By the organization of the United Shoe Machinery Company and the coalescence into one of the three groups of businesses formerly carried on separately by the defendants, the variety of choice open to a shoe manufacturer for obtaining the necessary shoe machinery was reduced from 24 ways to 16 ways.

The defendants then adopted what is known as the "tying" clause lease, which provided that any shoe manufacturer using any one class of machines furnished by the defendants should use for all his other machines only those furnished by the defendants; and that if he used any machine made by an Independent, the defendants would forfeit his lease and remove his machines. This form of lease immediately reduced from 16 to 2 the different ways by which a manufacturer could equip his factory, so that he had to get all his machinery from the defendants or get it all from the Independents.

[205] The effect of the combination was to place from 70 to 80 per cent of all the shoe-machinery business (in so far as it related to those essential machines known as the lasting, welt-sewing, heeling, and metallic fastening machines) into one hand. This combination into one group of four non-competitive businesses (which, taken together, constitute one complete business) curtailed the customer's liberty of action by compelling him to deal with one and the same group as to all four classes of machinery, whereas formerly he could deal with four separate groups. The question presented, then, is whether the combination into one group of 75 per cent of the whole business of the country in a particular line is in such restraint of trade as to violate the Sherman law, it being conceded that the combination was not attended by any methods of unfair competition or illegitimate trade practices. Without attempting to determine exactly at what percentage of trade control a combination passes into the region of illegal restraint, the Government insists that when a combination acquires between 70 and 80 per cent of the total trade in a particular business, the line between legal and illegal combinations has been passed; and

Argument for Defendants.

upon the use of a patented machine, yet when such restrictions are a part of one general scheme of combination the patent laws no longer authorize such restrictions. The rights given by the patent laws do not give universal license against the positive prohibitions of the Sherman Law, which is a limitation on all rights that might otherwise be pushed to evil consequences. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *United States v. The Reading Co.*, 226 U. S. 324.

The Criminal Appeals Act, 34 Stat. 1246, was not repealed by the adoption of the Judicial Code.

[207] The defendant's right of appeal to the Supreme Court was given in the fifth and sixth sections of the Circuit Court of Appeals Act which, in the proposed revision of the laws of the United States, was placed in chapter 10 on the "Supreme Court," in the title called "The Judiciary." The right of the *United States* to appeal to the Supreme Court was contained in the Criminal Appeals Act, which, in the same proposed revision was placed in chapter 18 on "Procedure on Error and Appeal."

Congress, in passing the Judicial Code, did not attempt to cover the whole body of the revision submitted to it, but only adopted the first 14 chapters of the title "The Judiciary"; so that while it incorporated into the Judicial Code, chapter 10, on the "Supreme Court" giving the defendant a right to appeal, it did not attempt to cover any of the field embraced in the later chapters of the revision. Therefore, those subjects, *inter alia*, which were dealt with in proposed chapter 18 were never even considered by Congress and therefore remained controlled by the former laws governing them—one of which was the Criminal Appeals Act. (Cf. Committee Report of 1907 of "Commission to Codify and Revise the Laws of the United States" and the Joint Committee of Congress' Revision of 1910. See Title XVI, "The Judiciary," chapters 10 and 18).

Mr. Frederick P. Fish and *Mr. Charles F. Choate, jr.*, with whom *Mr. Malcolm Donald* and *Mr. William A. Sargent* were on the brief, for defendants in error:

Only a single question is presented by the case.

Argument for Defendants.

to restrain such trade as they had in different commodities, or in any manner to restrain their own trade. *Addyston Pipe Co. v. United States*, 175 U. S. 211; *Montague v. Lowry*, 193 U. S. 38; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; *Continental Wall Paper Co. v. Voight*, 212 U. S. 227; *Ellis v. Inman*, 131 Fed. Rep. 182; *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106; *Blount Mfg. Co. v. Yale Mfg. Co.*, 166 Fed. Rep. 555; *United States v. Trans-Missouri Ass'n*, 166 U. S. 290; *Swift & Co. v. United States*, 196 U. S. 375; *Miles Medical Co. v. Park Co.*, 220 U. S. 373; *United States v. Standard Sanitary Co.*, 191 Fed. Rep. 172; *Bigelow v. Calumet & Hecla Co.*, 167 Fed. Rep. 721.

The combination created by the organization of the United Shoe Machinery Company was purely an economic arrangement, not in violation of any rule in restraint of trade at common law, or which has been announced by the Supreme Court. *Joint Traffic Case*, 171 U. S. 505.

The combination of businesses, each dealing with a different commodity, into one corporation, has never been held a restraint of trade either at common law or under the Sherman Act. *United States v. American Tobacco Co.*, 221 U. S. 106; *United States v. Reading Co.*, 226 U. S. 324; *Union Pacific Coal Co. v. United States*, 173 Fed. Rep. 737; *United States v. Standard Oil Co.*, 173 Fed. Rep. 177.

That the District Court was right in the only construction of the Sherman Act now before this court, to wit, in holding that the organization of the United Shoe Machinery Company was not within the purview of the Sherman Act, is further apparent from the fact that such organization of the United Shoe Machinery Company had no direct or immediate effect upon interstate commerce. If it had any effect at all upon interstate com[211]merce, such effect was accidental, secondary, remote, and not even probable. *Bigelow v. Calumet & Hecla Co.*, 167 Fed. Rep. 721; *Anderson v. United States*, 171 U. S. 604; *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618; *Standard Oil Co. v. United States*, 221 U. S. 1.

Opinion of the Court.

chine Company, under letters patent, made sixty per cent of all the lasting machines made in the United States; the defendants, Barbour and Howe, through the Goodyear Shoe Machinery Company, in like manner, made eighty per cent of all the welt-sewing machines and outsole-stitching machines, and ten per cent of all the lasting machines; and the defendant Storrow (against whom the indictment has been dismissed), through the McKay Shoe Manufacturing Company, made seventy per cent of all the heeling machines and eighty per cent of all the metallic fastening machines made in the United States. The defendants all were carrying on commerce among the States with such of the [216] shoe manufacturers as are outside Massachusetts, the State where the defendants made their machines.

On February 7, 1899, the three groups of defendants above named, up to that time separate, organized the United Shoe Machinery Company and turned over to that company the stocks and business of the several corporations that they respectively controlled. The new company now makes all the machines that had been made in different places, at a single new factory at Beverly, Massachusetts, and directly, or through subsidiary companies, carries on all the commerce among the States that had been carried on independently by the constituent companies before. The defendants have ceased to sell shoe machinery to the shoe manufacturers. Instead, they only let machines, and on the condition that unless the shoe manufacturers use only machines of the kinds mentioned furnished by the defendants, or if they use any such machines furnished by other machinery makers, then all machines let by the defendants shall be taken away. This condition they constantly have enforced. The defendants are alleged to have done the acts recited with intent unreasonably to extend their monopolies, rights, and control over commerce among the States; to enhance the value of the same at the expense of the public, and to discourage others from inventing and manufacturing machines for the work done by those of the defendants. The organization of the new company and the turning over of the stocks and business to it are alleged to constitute a breach of the Sherman Act.

Syllabus.

The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. [218] It is as lawful for one corporation to make every part of a steam engine and to put the machine together as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt. See *Virtue v. Creamery Package Manufacturing Co.*, ante, p. 8; *Swift & Co. v. United States*, 196 U. S. 375, 396.

It was argued as an afterthought that the act of March 2, 1907, c. 2564, 34 Stat. 1246, under which the United States took this writ of error, was repealed by the Judicial Code of March 3, 1911, c. 231; 36 Stat. 1087, 1168. But it is not mentioned among the statutes expressly repealed by § 297 of the latter act, it is not superseded by any other regulations of the matter, it is a special provision, and on principles similar to those discussed in *Ex parte United States, Petitioner*, 226 U. S. 420, it must be held not to have been repealed. See further *Johnson v. United States*, 225 U. S. 405, 419; *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 497.

Judgment affirmed.

UNITED STATES OF AMERICA v. PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, PACIFIC COAST STEAMSHIP COMPANY, ALASKA STEAMSHIP COMPANY, CANADIAN PACIFIC RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR ALASKA, DIVISION NO. 1.

No. 697. Argued February 26, 1913.—Decided April 7, 1913.

[228 U. S., 87.]

While under the Interstate Commerce Act a carrier may select its through route connections, agreements for such connections may constitute violations of the Anti-Trust Act if made not from natural trade reasons or on account of efficiency, but as a combination and conspiracy in restraint of interstate trade and for the pur-

Syllabus.

pose of obtaining a monopoly of traffic by refusing to establish routes with independent connecting carriers.^a

In reviewing the decision of the lower court sustaining a demurrer to an indictment charging a combination in violation of the Anti-Trust Act, this court is not called upon to consider what the elements of the plan may be independently, or whether there is or is not a standard of reasonableness which juries may apply. If a criminal violation of the act is charged, the criminal courts have cognizance of it with power of decision in regard thereto.

A combination made in the United States between carriers to monopolize certain transportation partly within and partly without the United States is within the prohibition of the Anti-Trust Act, and [88] also within the jurisdiction of the criminal and civil law of the United States, even if one of the parties combining be a foreign corporation.

While the United States may not control foreign citizens operating in foreign territory, it may control them when operating in the United States in the same manner as it may control citizens of this country.

The purpose of the Interstate Commerce Act is to establish a tribunal to determine the relation of communities, shippers, and carriers, and their respective rights and obligations dependent upon the act, and the conduct of carriers is not subject to judicial review in criminal or civil cases based on alleged violations of the act until submitted to and passed on by the commission.

Quære, what the effect is of a finding by the Interstate Commerce Commission in such a case.

Where the District Court holds that the averments of the indictment are not sufficient to connect certain defendants with the offense charged, it construes the indictment and not the statute on which it is based, and this court has no jurisdiction under the Criminal Appeals Act to review the decision.

An objection to the demurrer made by certain defendants and sustained as to one count, and not passed on as to other counts which were struck down by the District Court but sustained by this court, may be raised in the District Court by such defendants in regard to such counts when the case is again before that court.

[57 L. Ed. 742.^b]

MONOPOLY—UNDER ANTI-TRUST ACT—THROUGH-ROUTE AGREEMENTS.—

1. An agreement between connecting railway and steamship carriers and a wharfage company to establish a through route and

^a Syllabus and statements of arguments copyrighted, 1913, by The Banks Law Publishing Company.

^b The paragraphs following, in brackets, comprise the syllabus of the case as reported in volume 57, page 742, Lawyers Edition, Supreme Court Reports. Copyrighted, 1912, 1913, by The Lawyers' Co-operative Publishing Company.

Statement of the Case.

joint rates for transportation between Puget Sound and Yukon River points, to refuse to make such arrangements with other connecting carriers, and to charge high local rates and discriminating wharfage charges—all with the intent and result of eliminating all competition—violates the prohibitions of the Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), against combinations or conspiracies in restraint of interstate or foreign trade or commerce, or the monopolization of, or attempt to monopolize, any part of such trade or commerce.

For other cases, see Monopoly, II., in Digest Sup. Ct. 1908.

MONOPOLY—ANTI-TRUST ACT—EXTRA-TERRITORIAL EFFECT.—2. Extra-territorial effect is not given to the provisions of the Anti-Trust Act of July 2, 1890, by construing it to forbid a combination of foreign and domestic corporations to restrain competition in, and to monopolize, the transportation of freight and passengers between Puget Sound and Yukon River points over a route which lies in part outside the United States.

Construction of Anti-Trust Act, see Monopoly, in Digest Sup. Ct. 1908.

CARRIERS—REMEDY FOR DISCRIMINATION—NECESSITY OF ACTION BY INTERSTATE COMMERCE COMMISSION.—3. Discriminations practised by carriers in the giving or refusing of joint traffic arrangements contrary to the act to regulate commerce cannot be redressed by the courts in either a criminal or civil proceeding in advance of action by the Interstate Commerce Commission.

For other cases, see Carriers, III, in Digest Sup. Ct. 1908.

APPEAL—BY GOVERNMENT IN CRIMINAL CASE—CONSTRUCTION OF INDICTMENT.—4. A decision of a Federal district court on demurrer, that the averments of an indictment charging violations of the Anti-Trust Act of July 2, 1890, were not sufficient to connect the individual defendants with the offense charged, is a construction of the indictment, and may not be reviewed in the Federal Supreme Court at the instance of the Government.

For other cases, see Appeal and Error, I e, in Digest Sup. Ct. 1908.

APPEAL—JUDGMENT—REMANDING—DIRECTIONS TO LOWER COURT.—5. The Federal Supreme Court, when reversing a judgment of a Federal district court, sustaining demurrers to an indictment charging violations of the Anti-Trust Act of July 2, 1890, which is based upon the construction of that act, will leave it open to that court to pass upon such of the grounds of demurrer as were not considered in the former ruling—especially where the Government does not express great confidence in the sufficiency of the indictment.

For other cases, see Appeal and Error, IX 1, in Digest Sup. Ct. 1908.

Indictment for alleged violations of the Sherman Anti-Trust Act and of the Interstate Commerce Act.

Statement of the Case.

The indictment contains six counts. The first and second counts charge violations of the Anti-Trust Law. The first by the defendants engaging in a combination and conspiracy in restraint of trade and commerce with one another to eliminate and destroy competition in the business of transportation in freight and passengers between various ports in the United States and British Columbia in the south, and the various cities in the valleys of the Yukon River and its tributaries, both in British and American territory, in the north, upon a line of traffic described, for the purpose and with the intention of monopolizing such trade and commerce. The second count charges the monopolization of trade and commerce in the [89] same business and between the same ports. The manner of executing the alleged criminal purpose is charged to be the same in both counts.

The places of the incorporation of the corporate defendants are alleged, and the following facts: The Pacific Coast Steamship Company and the Alaska Steamship Company operate, respectively, lines of steamships as common carriers of freight and passengers running in regular route between Seattle, State of Washington, and Skagway, Alaska. The Canadian Pacific Railway Company is a like carrier and operates a line of steamships between Vancouver, British Columbia, and Skagway. During the time mentioned in the indictment the Pacific & Arctic Railway & Navigation Company owned and operated a railroad from tidewater at Skagway to the summit of White Pass, a distance of about twenty miles to the boundary line between Alaska and British Columbia, at which latter point it connected with a railroad owned and operated by the British Columbia Yukon Railway Company. The latter road extended from the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia and Yukon District of Canada, a distance of about twenty-five miles, at which point it connected with another railroad, owned and operated by the British Yukon Railway Company, which extends to White Horse on the headwaters of the Yukon River, in Yukon District of Canada. During all the times mentioned there was a line of steamers plying upon the

Statement of the Case.

Yukon River and the headwaters thereof between White Horse and Dawson, owned and operated by the British Yukon Navigation Company. The four corporations last above mentioned and their stocks and bonds were owned and controlled by the same persons and individuals, and the said three lines of railroads and their lines of steamers were under one and the same management and were operated as one continuous line [90] of common carriers of freight and passengers between the towns of Skagway and Dawson and way points under the name and style of the White Pass and Yukon Route, referred to as "the railroad" and had the sole and exclusive monopoly of the transportation business between Lynn Canal and the navigable waters of the Yukon River. A general trade and commerce was carried on between British Columbia and Puget Sound ports and the Yukon Valley, both in American and British territory, over the designated routes and to the various places on the routes, and the shortest and most natural route for such trade and commerce was, has been, and is by water craft from said southern ports to Skagway, and thence over Moore's Wharf, so called, to the points of destination. Trade and commerce from White Horse and Dawson to said southern ports would naturally, when left untrammelled by unlawful interference, move up the Yukon to the headwaters of that river and thence by way of said railroad to Skagway, Alaska, thence over said Moore's Wharf, and thence by steamship or other water craft to the said southern ports.

The North Pacific Wharves & Trading Company was the owner and in exclusive possession and control of all of the wharves at Skagway at which steamships or other water crafts could take and discharge, or load cargo, that company having a complete and absolute monopoly of the wharfage business at Skagway, and owning and operating the Moore Wharf, which wharf, by agreement between the Wharves Company and the railroad, had been made and was the terminus of the railroad over which all freight going to or coming from or passing through Skagway had necessarily to pass. The wharf was operated as a public wharf.

Statement of the Case.

boldt" on a regular schedule and route between Seattle, Washington, and Skagway. "The railroad," as we have seen the White Pass & Yukon route is called in all of the counts, had entered into and maintained during the time aforesaid with the defendant steamship companies a joint traffic arrangement whereby and under the terms of which freight and passengers might be billed at a joint through rate from the said southern ports over the route described to the various Yukon points, but refused without cause or excuse to enter into a joint traffic arrangement with the Humboldt Company, though requested to do so, or to receive, carry, or handle any freight billed through from Seattle to Yukon points on the railroad or the Yukon River; and neither would nor did carry any freight whatever from Skagway to any of said points in British or American territory at a less rate or charge than from 5 per cent to 30 per cent more, according to classification and character, than it received from the defendant steamship companies as its proportion of joint through rates from such southern points to the corresponding Yukon points. The railroad company, it is charged, caused the North Pacific Wharves & Trading Company to charge for all freight shipped on the steamship "Humboldt" for transshipment on the railroad to points along its line on the Yukon River a wharfage of \$2 per ton, whereas it included at the same time in its portion of the through rate on through bills under its arrangement with defendant steamship companies all wharfage charges. And it is alleged that the defendants knowingly, willfully, and maliciously induced and incited the railroad company to practice the discrimination described, and each and all aided and abetted one another and the railroad company in such practice.

[94] The other facts as to routes, commerce and carriers, their relations and arrangements and the effect of them are the same as in the first and second counts, the order of statement being somewhat different.

Count 4 is the same, as to the facts alleged, as the third count except the discrimination is charged to have been practiced against the Humboldt Steamship Company between August 18, 1910, and January 1, 1912.

Argument for the United States..

Count 5 brings the discrimination charged down to the finding and presentation of the indictment. There is no allegation of discrimination in wharfage charges.

Count 6 charges the crime of conspiracy to commit an offense against the United States by destroying competition between the defendant steamship companies and the Humboldt Steamship Company. The same facts are alleged as in the other counts.

Motions to quash the indictment and each of its counts were made and denied. Demurrers to the indictment were filed and sustained to all counts but the sixth. To that, the demurrer of the individual defendants was sustained.

Mr. Solicitor General Bullitt for the United States:

The United States may indict for violations of the Sherman Anti-Trust Act without the necessity of any prior action by the Interstate Commerce Commission on the facts involved.

An act may be in violation of the Sherman Anti-Trust Law without being in violation of the Interstate Commerce Act. *Meeker v. Lehigh Valley R. R. Co.*, 183 Fed. Rep. 548; *Texas R. R. Comm'n v. A., T. & S. F. Ry. Co.*, 20 I. C. C. Rep. 463, 465; *United States v. Joint Traffic Ass'n*, 171 U. S. 505; *United States v. Trans-Missouri Ass'n*, 166 U. S. 290.

The Interstate Commerce Commission has nothing to do with prosecutions under the Anti-Trust Act.

The United States may indict for unjust discriminations, [95] &c., in violation of the Interstate Commerce Act without the necessity of first having the Interstate Commerce Commission determine the legality or propriety of the acts complained of.

The Interstate Commerce Commission has powers as between carriers and shippers, but not as between the United States and carriers or shippers.

Different rules govern applications by shippers for relief in the courts from those governing the United States. (a) In the light of reason. (b) The provisions of the statute. (c) Under the authorities.

For suits between private parties see *Atlantic Coast Line v. Macon Grocery Co.*, 166 Fed. Rep. 206; *B. & O. R. R. Co.*

Argument for Defendants.

Holding that the indictment did not sufficiently specify the acts of the individual defendants which were relied upon as constituting a participation by them in the offense charged, or in aiding or assisting therein is not a construction of either the conspiracy statute, upon which that count of the indictment was founded, or of the Interstate Commerce Act, the violation of which was the crime which the defendants were alleged to have conspired to commit. The ruling of the court below sustaining the demurrer as to count 6 was based upon general principles of criminal pleading, and is not reviewable under this writ. *United States v. Keitel*, 211 U. S. 370; *United States v. Stevenson*, 215 U. S. 190.

Neither of the acts charged in the indictment, nor the two combined, amounts to undue restraint of trade or monopoly under the Anti-Trust Act, or undue discrimination under the Interstate Commerce Act.

The Pacific and Arctic Railway & Navigation Company [97] was constructed and operated from the international boundary line to Skagway. It was under no legal duty to assume any obligations whatever with respect of the carriage of either freight or passengers by water between Skagway and the southern ports. If it voluntarily assumed any obligations for carriage beyond its own line, it had the legal right at its own discretion to select the agencies beyond its own line for which it would be responsible. Under the principles of common law it had this absolute right, and could enter into an agreement for through routing and through rating with one connecting carrier and refuse to enter into any such agreement with any other connecting carrier. *A., T. & S. F. R. Co. v. D. & C. Co.*, 110 U. S. 667; *S. P. R. Co. v. I. Com. Comm.*, 200 U. S. 536; *Interstate Com. Comm., v. N. P. Co.*, 216 U. S. 538; *St. Louis Drayage Co. v. L. & N. R. R.*, 65 Fed. Rep. 39; *O. S. L. Co. v. N. P. R. Co.*, 51 Fed. Rep. 465; *C. & N. W. Co. v. Osborne*, 52 Fed. Rep. 912; *P. & S. Co. v. A., T. & S. F. Co.*, 73 Fed. Rep. 438; *G., C. & S. R. Co. v. S. S. Co.*, 86 Fed. Rep. 407; *Central Stock Yards Co. v. L. & N. R. Co.*, 118 Fed. Rep. 113.

The provision in § 1 of the Commerce Act, requiring carriers to establish through routes and just and reasonable

Argument for Defendants.

in the absence of any action by the Commission, an allegation that a carrier entered into a through routing agreement with one connecting carrier and refused to make such agreement with any other carrier, cannot be held to be undue discrimination under the Commerce Act, or undue restraint of trade under the Anti-Trust Act. *Tex. & Pac. Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. R. Co. v. [99] Pitcairn Coal Co.*, 215 U. S. 482; *Robinson v. B. & O. R. Co.*, 222 U. S. 506; *Proctor & Gamble Co. v. United States*, 225 U. S. 282.

The establishment or non-establishment of a through route in a given instance is administrative in its nature, and the determination of the necessity for its establishment is, in the first instance, committed exclusively to the judgment of the Commission by § 15 of the act.

The construction of the indictment by the court below, showing a difference in conditions under which different wharfage rates were charged, is binding upon this court. *United States v. Biggs*, 211 U. S. 507; *United States v. Patten*, 226 U. S. 525; *United States v. Winslow*, 227 U. S. 202.

The reasonableness of the wharfage rate on local shipments, and the reasonableness of the difference in the rate on local and on through-routed shipments, are questions for the solution of which there is no certain or fixed standard, and upon which different men might reasonably reach different conclusions. To make criminality depend, not upon facts, but upon the view of a jury as to the reasonableness of rates is contrary to fundamental principles. *Tozier v. United States*, 52 Fed. Rep. 917; *Van Patten v. C., M. & St. P. Ry. Co.*, 81 Fed. Rep. 545.

While it is alleged that the lines from Skagway to Dawson were under one and the same management and operated as one continuous line, it is not alleged that the defendant railroad company or any of the other defendants had any interest in or control over or participated in the operation of either of the three foreign lines.

The laws of the United States cannot make it either criminal or wrongful for the owners of a foreign railroad

Opinion of the Court.

lene Cotton Oil Co., 204 U. S. 427, and *Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 492.

It may be well, even at the expense of repetition, to give a summary of the indictment before passing to the special contention of the parties. The route described is between ports of the United States (called southern ports) and places in northern Alaska and Canada (called northern ports)—(1) by steamship lines from the United States and Vancouver (southern ports) to Skagway (the entire wharfage facilities being owned by The North Pacific Wharves & Trading Company); (2) thence by railroad to the headwaters of the Yukon River; (3) thence by boat down the Yukon River to Dawson, etc. (called the northern ports). The route is designated as the White Pass and Yukon Route and is constituted of (a) The Pacific and Arctic Railway and Navigation Company, a West Virginia corporation; (b) The British Columbia-Yukon Railway Company, incorporated under the laws of British Columbia; (c) The British-Yukon Railway Company, incorporated under the laws of the Dominion of Canada; and (d) The British-Yukon Navigation Company, Limited, incorporated under the laws of British Columbia. These companies are referred to as “the railroad company” and own the only line of transportation between the wharf at Skagway and the Yukon River.

By mutual agreement between the defendant steamship companies, the Wharves Company and the railroad company, through routes and joint rates were established, thus making one continuous line of common carriers for freight and passengers between the United States (southern ports) and northern Alaska (northern ports).

The Humboldt Steamship Company and other independent lines plied between the United States and Skagway.

[102] By agreement between the defendants the railroad refused to make any through route or joint rates with the Humboldt Company or with any of the independent steamship lines and refused to bill freight or passengers from the United States to Yukon River points, or reversely, except by ships belonging to one of the defendant companies.

Opinion of the Court.

Humboldt Company or any of the independent companies. The Wharves Company gave its assent by its wharfage charges and all evasion was prevented by so fixing the local rates that their combination was greater than the through rate agreed on. It is manifest that the scheme was effective and cut out the Humboldt line and the independent lines as factors in the routes of transportation between the United States and the Yukon River points. Is the scheme illegal?

This is asserted by the Government and denied by the defendants. The court below, if we take some parts of its decision, held that the forum of that question was the Interstate Commerce Commission. But, considering the decision of the court as a whole, we think it construed the Anti-Trust Act, upon which counts 1 and 2 were based, and to those counts we shall confine our discussion for the present. This is admitted by defendants. They say that as the court held that in order to constitute restraint of trade or monopolization of trade under the Anti-Trust Act the act charged must be such as at common law constituted restraint of trade, and were unlawful, to that extent the court construed the act. And, setting forth the grounds of the ruling, counsel say that the court decided that the entering into through route agreements by a common carrier with one or more connecting carriers [104] and the refusal to make such agreements with other connecting carriers was not unlawful either at common law or by the Interstate Commerce Act, and the court held, therefore, that such act did not constitute restraint within the meaning of the Anti-Trust Act. The right of a carrier to select its connections must be admitted (we state the right as absolute, without regard to the Interstate Commerce Act, for our present purposes), and if there were nothing else in the case the conclusion of the District Court would have to be affirmed. But there is another and important element to be considered. The charge of the indictment is that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of

Opinion of the Court.

consider whether the Interstate Commerce Commission has power to pass on the rates, as such, or through routing, as such. We are dealing with an indictment which charges a criminal violation of the Anti-Trust Act, and of that the criminal courts have cognizance, with power of decision upon the principle which we have expressed.

The next contention of defendants is that as part of the transportation route was outside of the United States the Anti-Trust Law does not apply. The consequences and, indeed, legal impossibility are set forth to such application, and, it is said, "make it obvious that our laws relating to *interstate* and *foreign* commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and * * * it is equally clear that [106] our laws cannot be extended so as to control or affect the foreign carriage." This is but saying that laws have no extra-territorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept. The indictment alleges that the four companies which constitute the White Pass & Yukon Route (referred to as the railroad) and owned and controlled by the same persons, entered into the combination and conspiracy alleged, with the intention alleged, with the Wharves Company and the defendant steamship companies. In other words, it was a control to be exercised over transportation in the United States, and so far is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.

The ruling of the District Court, sustaining the demurrer to the first and second counts, was therefore erroneous.

The decision of the District Court upon counts 3, 4, and 5 must be determined upon different principles than those which we have just expressed in passing on counts 1 and 2. The District Court, as we have seen, decided that the con-

Syllabus.

untrammelled flow of trade and commerce between the States and foreign nations." Thus while it may be admitted that not all the means alleged need be proved, the charge invited the jury to consider all and permitted a verdict upon any one of them. The fifth, sixth, and eighth statements of means to be employed were withdrawn from the jury, but the jury's attention seems not to have been called to the fact that some of the charges were abandoned, in the connection in which it was important. Furthermore, one of the means alleged was the false raising of grades and false gauging. Taken with other evidence, if it was shown to be systematic it would have had a tendency to show the scheme alleged. But taken by itself, as the jury might have taken it under the instructions, it showed only cheating and could not warrant a finding of the conspiracy with which the defendants were charged. It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged; for instance, the first, as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point.

Judgment reversed.

Mr. Justice PITNEY dissents.

UNITED STATES v. LAKE SHORE & M. S. RY.
CO. ET AL.

(District Court, S. D. Ohio, E. D. December 28, 1912.)

[208 Fed. Rep., 295.]

MONOPOLIES (§ 16)—ANTI-TRUST ACT—COMBINATION BETWEEN COAL-CARRYING RAILROADS.—Coal-carrying railroads extending into the same coal fields, although reaching different mines, or extending into different fields where competing coal is produced, which traverse generally parallel lines and reach either directly or through their connections the same markets in other States, must be regarded as natural competitors in interstate commerce, and any arbitrary methods between them or between them and the

Opinion of the Court.

like amount of the stock of the Sunday Creek Company. Thus the Hocking Valley and the Toledo & Ohio Central, in the proportions mentioned, acquired \$3,750,000 par value of the total of \$4,000,000 par value of the capital stock of the Sunday Creek Company; and on April 23, 1906, 2,488 shares were ordered to be issued in a single certificate in the name of the Central Trust Company of New York, to the end that they would not be issued except with its approval, the remaining 12 shares having apparently been issued as qualifying shares for directors.

The Trunk Lines' Purchase of a Majority of the Hocking Valley Capital Stock.—Prior to the merger so made of the coal interests of the Hocking Valley, to wit, June 29, 1903, five of the trunk line railroads, viz., Lake Shore & Michigan Southern Railway Company, Erie Railroad Company, Baltimore & Ohio Railroad Company, Chesapeake & Ohio Railway Company, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, entered into an agreement with J. P. Morgan & Co. to purchase from that company 69,242 shares of common capital stock of the Hocking Valley at a price and upon terms specified; Morgan & Co. having “arranged to borrow the moneys forthwith to make payment for said shares to the depositors under a syndicate agreement dated December 4, 1902.” Morgan & Co. were to carry the loan for the benefit of the purchasing companies for three years; and such purchase was completed. The aggregate purchase price was \$7,270,410, and each of the purchasing companies obtained one-sixth interest in the shares so purchased, except the Pittsburgh, Cincinnati, Chicago & St. Louis, which acquired two-sixths. As indicative of the effect of this upon the policy of the Hocking Valley, it is sufficient to state that an advisory committee (composed of representatives of the trunk lines) and the president of the Hocking Valley had frequent conferences relative to the financial affairs of the Hocking Valley and the coal companies in which it was interested, and the introduction or not of track connections between the lines [305] of the Hocking Valley system and the independent coal mining

Opinion of the Court.

between the Hocking Valley and the Central Trust Company of New York, respecting the shares of the Hocking Valley in the Sunday Creek Company. After reciting that the Hocking Valley is the owner of 32,375 shares of the Sunday Creek Company (also, among other things, that all these shares with others were pledged through a trustee as collateral security for the bonds issued under the first consolidated mortgage of the Hocking Valley and the Buckeye Coal & Railway Company, and that in view of the penalties imposed for violation of the Hepburn Act (act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]) and of a desire to obey the law if constitutional, and at the same time to preserve to the owners of the capital stock of the railway the equity in such coal properties, which could not be disposed of by reason of such pledge), it was agreed that the railway company had sold and assigned to the trustee all its interest in such shares of stock, subject to the lien of the mortgage and the rights of the boldholders thereunder, in trust, for the proportionate benefit of the holders [306] of record of the stock of the Hocking Valley and for any distribution of its assets; that the trustee should have the right to vote the shares of stock at all meetings of stockholders of the company, to collect dividends, and (if the Hocking Valley is not in default under its mortgage) to distribute them among the holders of the stock. The only other provisions of the contract so made with John H. Doyle and the Central Trust Company that need be noticed are set out in the margin.²

² "In the event, however, that the said Supreme Court shall decide said Commodity Clause of said Hepburn Act constitutional, then said trustee shall dispose of the equity in said coal stocks sold and assigned to it in trust for the purposes of this agreement (subject, however, to the lien of the first consolidated mortgage, and its rights as pledgee trustee thereunder), when and as directed in writing by the persons, firms, or corporations holding and owning of record a majority in amount of the stock of the Railway Company as hereinafter provided, and when such sale or distribution is made by the trustee hereunder, and the entire proceeds, whether of stocks, bonds, moneys, or other securities, shall have been actually paid to and received by the said trustee, then the said trustee shall distribute, less

Opinion of the Court.

of the present Hocking Valley, the Toledo & Ohio Central, and the Columbus, Sandusky & Hocking, the predecessor of the Zanesville & Western), and that of these seven lines three operated in one district and the other four lines in a field lying east of that district. The three lines so alluded to could have been no others than the exclusively Ohio lines now in question. It was further declared that, in addition to the competition above indicated, the situation was complicated by the fact that of late years the West Virginia coals were rapidly supplanting the Ohio coals in the markets reached by the latter. And, in short, the evidence fairly shows that the union of interests so induced was carefully developed, and that its inevitable tendency and effect were to combine and monopolize the stocks and interests of these railroad companies and coal companies, and so to stifle competition in restraint of trade among the States within the settled meaning of the Anti-Trust Act.

[3, 4] *The conditions created by and maintained since the March agreement.*—Has the situation described been so changed by or under the agreement of March 12, 1910, as to entitle defendants as they claim to a dismissal of the bill? They forcibly urge that what was done prior to the March agreement has nothing to do with what has been done since. Objections were continuously made to the introduction of evidence tending to show conditions existing before the agreement. Complainant insists that what followed the execution of the March agreement was but a continuation of what preceded it. The fact that we have considered the evidence shows, of course, that we regard it as admissible. It can not escape notice that some of the defendants were parties to such earlier transactions, and that other acquiesced in and adopted such transactions before the March agreement was made. *Lincoln v. Claflin*, 74 U. S. (7 Wall.) 132, 138, 19 L. Ed. 106; *United States v. Standard Oil Co.* (C. C.) 152 Fed. 290, 294, per Sanborn, circuit judge, and Circuit Judges Van Devanter, Hook, and Adams concurring. The acts and transactions of the first period therefore ought to aid in some measure to elucidate the intent and effect of the March agreement, and of the acts and transactions of

Dentson, J., dissenting.

the Commodities Clause of the Hepburn Act and the "mere instrumentality" theory of the Lehigh case, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458, rather than upon the Sherman Act; but the use of either basis brings the same result. Beyond the matter of the coal companies, and in the mere present relation of the railroads to each other, I am unable to see any monopoly or restraint of commerce forbidden by the Anti-Trust Law. Some of the considerations compelling me to this opinion are these:

1. It is true that the history of their former relations during the 1900-1910 period must be studied for whatever bearing it may have on their present intent; but this study discloses to me not continuance but change, not identity but antithesis. The Hocking and the Central^{*} were parallel roads with common termini and with other common points. They had competed bitterly for the Hocking coal district traffic to Columbus and to Toledo, as well as for all other traffic originating on their lines and destined to common points. In 1900 the Hocking bought the Central, and from then until March, 1910, this naturally and theretofore actually competing line was owned by the Hocking. The Hocking dictated the policy of both. Both had the same directors and managing officers. The merger was complete. Competition was not restrained; it was eliminated. No more perfect union and joinder in operation, while saving the former corporate identity of each, could be stated. After March, 1910, these two roads continued physically as before; but neither the Hocking nor its dominating stockholder had any ownership of the Central or had any interest, direct or indirect, in such ownership; nor did the Central or its dominating stockholder have any ownership of or direct or indirect interest in the Hocking. No director or officer of one road was director or officer in the other,

^{*}I will refer to the Hocking Valley Railway Company as "the Hocking"; to the Toledo & Ohio Central and the Zanesville & Western Railroads as "the Central"; to the Kanawha & Michigan Railway Company as "The Kanawha"; to the Lake Shore & Michigan Southern Railway Company as "the Lake Shore"; and to the Chesapeake & Ohio Railway Company as "the Chesapeake & Ohio" or "the C. & O."

Denison, J., dissenting.

the sole interest of either purchaser. The Chesapeake & Ohio desired an outlet to Lake Erie for all of its own great [826]traffic.¹⁵ For this purpose, it desired to buy the Hocking. This purpose and this desire were beyond criticism; but to reach Gallipolis, the nearest point on the Hocking, it must build across the Ohio River and over 30 miles of difficult country, and it must then, for its traffic, either practically rebuild the Hocking River division, 75 miles, to Logan, or build, new, 50 miles, to Athens, in order, one way or the other, to reach the modernized lines of the Hocking. Why should it be required to do this, paralleling the Kanawha, when it could buy such an interest in the Kanawha as secured to it the indefeasible right to use the Kanawha as this connecting link? What rule of public policy required it to build this new road instead of buying the existing road?

Turning to the Lake Shore, we find that it desired to buy the Central for the purpose of reaching the coal fields and getting both coal traffic and fuel coal for itself and its allied New York Central lines, and to make connections for through traffic both ways, with the Coal & Coke and the Western Maryland roads. These were rightful and legitimate objects, also beyond criticism. So was its desire to have this feeder reach the Kanawha district. Apparently no one questions that it could rightfully have purchased the Kanawha outright, nor is there, to my mind, any reason for ascribing to the Lake Shore any moving purpose in the whole transaction of March except that just mentioned.

We find, then, that the Chesapeake & Ohio had the legal right to buy the Kanawha and a strong and lawful motive for so doing, and that the Lake Shore had the same right

¹⁵ That this was real, not pretended, is shown by what happened. In 1909, the first full year before the change, the C. & O. delivered to the Kanawha for hauling over its line 4,000 tons of coal and coke and 70,000 tons of other freight. In 1911, the first full year after the change, it so delivered 811,000 tons of coal and coke and 168,000 tons of other freight. Between the same periods, southeasterly bound freight received by the C. & O. from the Kanawha increased from 122,000 tons to 190,000 tons. This enormous tonnage given by the C. & O. to the Kanawha was not merely diverted from the other connections of the C. & O., because there was no decrease in the tonnage given to these other connections.

Denison, J., dissenting.

creased in the last six months of 1911 to 42,000 cars. This does not seem to indicate a substantial restraint of trade and commerce. It seems to me clear that the Kanawha shippers and their dependent public have been benefited by the transaction of March, 1910, taken as a whole, and that interstate trade and commerce have been promoted thereby;¹⁸ while the only restraint affecting such shippers or such commerce is theoretical rather than actual, and such as [329] it is, arises out of a natural, if not necessary, incident of the main transaction.

10. There remain for consideration two further suggestions. It is said that the Hocking and the Kanawha are competing roads, and hence that the former cannot take part in managing the latter, either directly or through the instrumentality of the Hocking's chief stockholder. I am not satisfied that these two roads are in any fair sense competing. That portion of the Kanawha extending from Hobson north 40 miles to Corning, and that portion of the Hocking extending from Logan south 50 miles to the river, are substantially parallel and 20 miles apart. There is some traffic to and from two or three small towns, Pomeroy, Middleport and Gallipolis, but the Kanawha does not reach these towns with its own track and runs to them over the Hocking under a trackage contract which does not permit it to compete with the Hocking, except by the latter's sufferance. A small amount of coal is produced at some mines along the southern part of the Hocking river division. The Kanawha might, by building its own spurs and branches, reach these three towns and these mines, but the whole of the traffic so reachable and as to which, theoretically, there might be competition, is negligible both in percentages and in total volume; neither is any reason shown to anticipate increase.

The relative positions of the Hocking and the Kanawha are not those of parallel and competing roads, but those

¹⁸In 1909 the New York Central lines were furnishing 1,600 cars per month to the Central; in 1911, 8,300 cars per month. Coal production at the mines on the Central increased 500,000 tons for 1911 over 1909.

Denison, J., dissenting.

point, competition for freight originating at Charleston or coming in over the Coal & Coke Railroad and destined for the Northwest. The interest of the C. & O. in the Kanawha would theoretically tend to restrict this competition, though the tendency would be imperfect, because over its own lines the C. & O. would get the entire haul to Chicago, while the other way it would be interested in half the profit on the haul from Charleston to Armitage, and half of the volume of the traffic from Armitage to Toledo. One common point, with the amount of traffic existing at Charleston, would, in any event, be hardly sufficient to give a competing character to these railroads, but, even if the theoretical but imperfect tendency to limit this competition could ever sufficiently invalidate an interest by one in the other, yet, in this case, such tendency must yield to the undisputed testimony, which is that the competition at Charleston between the soliciting agents has continued active and vigorous since March, 1910, as before.

The map also suggests that control of the Kanawha might be used to block the making of a through line from the seaboard to the lakes, by way of the Virginian, the Kanawha, and the Central, which through line would, as a whole, compete with the C. & O. It is sufficient to say of this suggestion that no such issue is suggested by any pleading, and that the Lake Shore, in purchasing its interest in the Kanawha, guarded against interference by the C. & O. with such possible future plan.¹⁰

Upon the whole case I see two great shipping districts with interests involved—the Hocking coal district and the Kanawha coal district. The Hocking shippers *were* subject to a monopolistic combination of all transportation facilities. They *now* have these facilities divided between two trunk

¹⁰ Indeed, the entire subject matter of this numbered paragraph should be disregarded for the same reason. Paragraph 20 of the bill limits the issue to the charge of a continued combination between the Hocking, the Central, the Zanesville, and the Kanawha. It is important to know what the C. & O., as owner of the Kanawha, is doing with the Kanawha; but, to the issue tendered and made, it is immaterial whether the C. & O. is under disability to become the owner of the Kanawha.

Opinion of the Court.

1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Decision for plaintiffs.

Randall J. Le Bœuf, of Albany, N. Y., and *James G. Marks*, of Pittsburgh, Pa., for plaintiffs.

Lewis E. Carr, of Albany, N. Y., *S. E. Everts* and *J. B. McCormick*, both of Granville, N. Y., and *F. L. Taft*, of Cleveland, Ohio, for defendants.

RAY, District Judge.

Having in view the salient and controlling facts in this case, nearly all of which are undisputed, and the more recent decisions of the Supreme Court of United States, I am forced to the conclusion that the defendants, except as mentioned in the findings, have violated the statute above referred to, the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to the damage of the plaintiffs, and that the plaintiffs have shown that they have sustained some damage, and that under the stipulation the court should proceed to take proof of such damages.

The defendants have filed many requests to find, which I do not pass upon, except as the findings made determine them, but reserve the right to pass on them before final judgment, and when the defendants shall have determined what additional facts they regard essential to have determined or passed upon specifically. The findings made and filed herewith, and made a part hereof, show, I think, that prior to August, 1904, the producing defendants were engaged in business in the production and sale of "sea green" slate in competition with each other and all other producers of "sea green" slate in the United States; the producing area of such slate being confined to a narrow strip of territory along the western boundary of the State of Vermont and near the eastern boundary of the State of New York. Slate of other colors and qualities were and are produced in Maine, Pennsylvania, and elsewhere, and, of course, there was more or less competition between these other slates and "sea green" slate; but the sea green had a limited

Opinion of the Court.

I acquit the defendants of any willful purpose or conscious design to violate this act; but this is no defense, if the agreements made and their execution necessarily operate to unduly and unreasonably restrain trade or commerce among the several States. See *Addyston Pipe case*, 175 U. S. 211, 214, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679. So far as the intent of the defendants is involved, they are presumed to have intended the necessary, natural, and known effects or consequences of their agreements and acts, and if these effects or consequences be to unduly restrain interstate trade and commerce, then the combination is illegal, and the participants are chargeable with the consequences, and are liable for the damages resulting. See also *Continental Wall Paper Co. v. Voight*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, and *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815.

In *United States v. Union Pacific R. R. Co., et al.*, 226 U. S. 61, 85, 22 Sup. Ct. 53, 57 (57 L. Ed. 124), the court said:

"We take it, therefore, that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable."

[190] See *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

In the case at bar we find a combination which places several producing and selling persons, corporations, and companies engaged in interstate commerce in such a relation to each other as to create a single dominating control in one corporation, the American Sea Green Slate Company, whereby the natural and theretofore existing competition in producing and selling Sea Green slate in interstate commerce is unduly restricted. The contention for a long time made,

Opinion of the Court.

stituted violations of the decree of the court, and it is to this aspect of the case that this opinion will be addressed. The United States disclaims any purpose of asking punishment for any act not a violation of the act of July 2, 1890, though it might be held to be a violation of the terms of the decree. It rested its case entirely upon the first section of the act of July 2, 1890, which prohibits contracts, conspiracies, or combinations in restraint of interstate trade.

[1] I. The United States contends that an association having the declared purposes of the defendant association constitutes by its very existence a conspiracy in restraint of interstate trade and commerce, [488] in violation of the Sherman Anti-Trust Act. The decree does not enjoin the maintenance of the organization of the association. On the contrary, it contains the express recital:

"The said association and its officers and members are not restrained from maintaining said organization for social or other purposes than those herein prohibited."

In order to constitute an act or omission a contempt, the United States is, in view of its concession, required to establish, with the degree of certainty required in criminal cases: (1) That the act or omission is a restraint of interstate trade under the Sherman Law, and (2) that it is prohibited by the terms of the decree. No reciprocal concession was made by the defendants, having the effect of relieving the plaintiff from establishing the second proposition.

The contention of the Government is that, while the decree permits the continued maintenance of the association's organization as a legal entity, it does not legalize its existence for the purposes and objects set out in its constitution and by-laws. The general tenor of the alleged objectionable purposes there set forth was the promoting of harmony between the members of the association, who were exclusive wholesale grocers doing business in 14 southern States, and the manufacturers of food products, to the end that the wholesale grocers might be recognized as the economical channel of distribution of the products of the manufacturers.

Opinion of the Court.

director of the defendant Independent Ice Company, who holds in trust the majority of that company's voting stock.

After setting forth acts of the other defendants from which the above claim for damages is alleged to have arisen in the Independent Company's favor, the bill alleges a demand, made by the plaintiffs as stockholders in that company, upon its president and directors for the institution of a suit in its name, under section 7 of the Anti-Trust Act, against the Boston Ice Company for the damage claim [460] alleged to exist and the failure or refusal of those directors to bring such suit. The relief prayed for is: (1) An account of the damages sustained by the Independent Company and a decree for three times the amount thereof, with costs and attorney's fee, to be paid either by the other defendants to said company or a part of said damages, in proportion to the stock owned by them, to be paid by the defendants to the plaintiffs; (2) in the alternative, the appointment of a receiver to sue for and collect such damages; (3) for other and further relief, etc.

According to the bill, the plaintiffs are Massachusetts citizens and so also are the defendants, the Boston Ice Company, George A. Taylor, the Independent Company's treasurer, and Frank J. Bartlett, the American Company's president. The bill discloses no matter in controversy, therefore, between citizens of different States and is maintainable in this court, if at all, only because it presents a matter in controversy arising under the Federal statute referred to.

The bill does not ask for any preventive relief, such as it would be within the general equity jurisdiction of the court to afford, against injury resulting or to result from an unlawful combination. Of such a suit the court might have jurisdiction independently of diverse citizenship because a Federal question was involved. *Chalmers, etc., Co. v. Chadeloid & Co.* (C. C.), 175 Fed. 995. On the contrary, as the plaintiffs expressly state in their brief, the suit is one "to enforce a remedy provided by the act itself; that is, a judgment for threefold damages and costs." The defendants raise the objections that the court has no jurisdiction to entertain the bill or grant the relief for which it prays, and

Opinion of the Court.

that it has no jurisdiction to entertain any suit in equity under the act wherein any person other than the United States, by its Attorney General, is the plaintiff. These objections are first to be considered.

[1] As the plaintiffs concede, it is settled that a stockholder cannot maintain a suit at law authorized by section 7 of the act for injury to the business of his corporation whereby the value of his stock is impaired. The right of action created by this section is in the corporation alone, representing all its stockholders. *Ames v. American, etc., Co.*, 166 Fed. 820 (C. C. Mass. 1909); *Loeb v. Eastman, etc., Co.*, 183 Fed. 704, 106 C. C. A. 142 (C. C. A. 3d Circ. 1910). They are therefore obliged to contend that the act permits minority stockholders to accomplish through a bill in equity what they could not accomplish by a suit at law under section 7, jurisdiction whereof, as that section expressly provides, might be had in any district where the defendants could be found, irrespective of diverse citizenship or amount.

The Anti-Trust Act contains express provisions determining the remedies whereby and the courts wherein its provisions are to be enforced, instead of leaving them to be ascertained according to the general statutory provisions governing such matters. Section 7, regulating suits at law, has been referred to. Section 4 invests the Federal courts with jurisdiction "to prevent and restrain violations of this act," but goes no further in expressly giving them jurisdiction in [461] equity, and by the same section it is made the duty of the law officers of the Government to institute the equity proceedings authorized.

In view of these express provisions, the Court of Appeals for the Fifth Circuit has held, in *Gulf, etc., Co. v. Miami, etc., Co.*, 86 Fed. 407, 420, 421, 30 C. C. A. 142 (1898), that suits in equity or injunction suits by other than the Government of the United States are not authorized by the act. And the Court of Appeals for the Second Circuit has later held, in *National, etc., Co. v. Mason, Builders, etc.*, 160 Fed. 259, 263, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148 (1909), that the injunctive remedy is available to the Government only, and the individual can only sue for threefold damages. These are

Opinion of the Court.

to be sustained. It seems to me, on the whole, sufficiently alleged at least that in 1906 the control by the Boston Company was so exercised as to cause acceptance by the Independent Company of a price for certain ice less than its market value and less than the Boston Company, to which it had been sold and delivered, had agreed to pay; also that the same control was so exercised in 1909 as to prevent any sale of certain ice which, but for such exercise of control, might have been profitably sold. I cannot say that these allegations do not describe an injury to the Independent Company's business or property.

Lastly the defendants object that the bill does not contain allegations meeting the requirements of equity rule 94 (rule 27 of the rules of 1912 [198 Fed. xxv, 115 C. C. A. xxv]) with regard to stockholders' bills. A letter dated July 20, 1910, is set forth, alleged to have been sent by the plaintiffs to the president and directors of the Independent Company. In one place it asks for the bringing of suits under the act against all the present defendants except Bartlett and Taylor, in another for the bringing of such a suit as is now brought against the Boston Company alone. A refusal by the directors to bring such suits is alleged, under date of September 7, 1910. The present bill was filed March 8, 1912. There are no allegations that the same president and directors continued in office from July, 1910, to March, 1912. No effort to obtain action by the stockholders independently of the directors is alleged, but it is alleged that further efforts to obtain action by either directors or shareholders would be "manifestly useless." In view of *Delaware, etc., Co. v. Albany, etc., Co.*, 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862, and of the relations disclosed in the bill between the plaintiffs and the directors and other stockholders of the Independent Company, I should be unable to sustain [465] this objection by itself, however much is left to be desired by those allegations of the bill which are intended to meet rule 94 (27).

I am obliged, however, for the other reasons stated, to sustain the demurrer.

Demurrer sustained.

Opinion of the Court.

monopolize such commerce; also that the alleged unlawful acts set forth were done in pursuance and furtherance of such combination, conspiracy, or attempt. The suits therefore are brought under section 7 of the Anti-Trust Act (26 Stats. 209). Each plaintiff says he owns a considerable amount of stock in the Independent Ice Company, a Maine corporation, and was a director of that company from 1895 until February 12, 1908. The plaintiff Corey says that he was also treasurer from 1903 until February 13, 1908, at a yearly salary of \$2,100. The plaintiff Ferris says that he was also president from 1903 until February 13, 1908, at a yearly salary of \$2,400.

The injury alleged by each to his "business and property" is set forth as follows: According to each declaration the defendant company acquired control of the management of the Independent Com[466]pany, the two corporations having previously been competitors. It obtained and exercised such control by the voting power of a majority of the Independent Company's stock held in trust, and through an election of directors, a majority of whom had been nominees and business associates of the defendant, subservient to its interests and ready to do its bidding. On February 12, 1908, a stockholders' meeting was held to choose directors and officers. The only stock represented was that held in trust as above. In the language of the declarations, "at said meeting the plaintiff failed of re-election as a director." Each declaration then described what had thus been done at the meeting in the following terms:

"And (the plaintiff) was thus dismissed and ousted from said office through the exercise of the voting power belonging to said shares."

In each declaration the plaintiff next alleges that at a subsequent directors' meeting on February 13, 1908, "he was also dismissed and ousted from his office as (treasurer or president) by the election of a new (treasurer or president)," and that "the directors and officers elected at said meeting were the nominees of the defendant."

Reference is made in the declarations throughout to the doings thus described at the meetings of February 12th and 13th as a dismissal or dismissal and ouster of the plaintiffs,

Opinion of the Court.

the defendant is, by the said action of the said complainant herein, being wrongfully and unlawfully prevented from fairly competing with the complainant, and the public thereby greatly deceived, prejudiced, and damaged."

Surely, if the defendant has such a cause of action as entitles it to redress against an unfair competitor, some overt act of the plaintiff, specifically directed against the defendant or its customers, or which injuriously affects the defendant's business reputation and good will specifically, must be known by it and be capable of precise averment. No such acts, however, are pleaded, and the conclusion is irresistible that the purpose of the pleading was not so much to outline the specific injury being perpetrated upon the defendant as a separate identity, as that which it in common with others in the same trade was suffering because of the plaintiff's violation of the Anti-Trust Law. For such injury and violence, only the United States, in the exercise of its governmental power and duty to protect the general public, may bring suit. Anti-Trust Act, § 4; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. For such lack of definiteness and particularity such paragraph must be struck out.

[4] Paragraphs 61 and 62, the remaining ones attacked by this motion, and which are inserted by way of counterclaim, seeking treble damages under such Anti-Trust Act, are also subject to a like infirmity. These, however, are objectionable for a greater (because incurable) reason in that the defendant thereby seeks to set up in an equity suit a claim that can only be maintained in a suit at law. Only counterclaims "which might be the subject of an independent suit in equity" may be set up in an answer to an equity bill. New Eq. Rule 30 (201 Fed. v, 118 C. C. A. v).

The subject matters of all of these paragraphs fall within the condemnation of *Terry Steam Turbine Co. v. Sturtevant Co.* (D. C.), 204 Fed. 108, and *Williams Patent Crusher & Pulveriser Co. v. Kinsey Mfg. Co.* (D. C.), 205 Fed. 375; but the later case of *Vacuum Cleaner Co. v. American Rotary Valve Co.*, 208 Fed. 419, decided by the United States District Court for the Southern District of New

Syllabus.

York (memorandum filed May 2, 1913), holds that practices which amount to unfair competition may be interposed as a defense under such rule. In the present case a decision of this question, for the reasons given, is unnecessary:

All the recited paragraphs, as well as Nos 28, 29, 30, 32, 34, 35, 36, 37, 45, 48, and 54, repeated by such answer in aid of these alleged defenses, in so far as they are thus repeated and relied upon to support them, must be struck out. Prayers 5, 6, and 7, being based on such defenses, must also be struck out.

The motion is granted, with costs.

**UNITED STATES v GREAT LAKES TOWING
CO. ET AL.***

(District Court, N. D. Ohio, E. D. February 11, 1913.)

[208 Fed. Rep. 783.]

MONOPOLIES (§ 12)—ANTI-TRUST ACT—"COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE."—A combination formed for the express purpose and with the express intent of eliminating the natural and existing competition in interstate commerce, and of monopolizing and restraining such commerce by the employment of unusual and abnormal methods of business, or which places the direct instrumentalities of interstate commerce in such a relation as to create a single dominating control in one corporation, whereby natural and existing competition in such commerce is unduly restricted or suppressed, is one in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).^b

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.

For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1276; vol. 8, p. 7606.]

COMMERCE (§ 17)—INSTRUMENTALITIES OF INTERSTATE COMMERCE—Towing Tugs.—Tugs employed in the business of towing into and out of harbors and between ports, vessels engaged in interstate commerce, and in the lightering and wrecking of vessels so engaged, are themselves instrumentalities of interstate commerce.

* For later opinion (217 Fed. 656), see *post*, page 368. Case pending on appeal of the United States in the Supreme Court.

^b Syllabus copyrighted, 1913, 1914, by West Publishing Company.

Opinion of the Court.

and foreign commerce in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 10, 12; Dec. Dig. §§ 12, 16.]

In Equity. Suit by the United States against the Great Lakes Towing Company and 51 other defendants. Hearing on pleadings and proofs. Decree for complainant.

U. G. Denman, U. S. Atty., of Cleveland, Ohio, and *E. P. Chamberlin*, Sp. Asst. U. S. Atty., of Bellefontaine, Ohio, for complainant.

Goulder, Day, White & Garry, and *Hoyt, Dustin, Kelley, McKeehan & Andrews*, all of Cleveland, Ohio (*Harvey D. Goulder* and *Hermon A. Kelley*, both of Cleveland, Ohio, of counsel), for defendants.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM.

The United States filed its petition in equity against the Great Lakes Towing Company, the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, the Pittsburgh Steamship Company, and 46 other defendants, corporate and individual, charging the maintenance of a monopoly in transportation of persons and property in commerce between the States and with Canada, and a combination in restraint of such commerce, in violation of act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), known as the "Sherman Act." The specific monopoly and restraint charged relate to the business of vessel towing on the Great Lakes; the proofs being specially directed to the [785] harbors of Duluth, Sault Ste. Marie (Michigan), Port Huron, Detroit, Chicago (embracing South Chicago, Gary, Whiting, and Indiana Harbor), Toledo, Sandusky, Lorain, Cleveland, Fairport, Ashtabula, Conneaut, Erie, and Buffalo (including Tonawanda and Black Rock).

Previous to and in the year 1899 the towing into and out of the harbors mentioned of vessels engaged in commerce on the Great Lakes was done by independent tug or towing

Opinion of the Court

1899, under the laws of New Jersey, with an authorized capital stock of \$5,000,000, the first of the purposes stated in the certificate of incorporation being—

“to do a general towing, wrecking, salvage, dredging, and contracting business on the Great Lakes, in all the harbors thereof, and in all streams and waters tributary thereto or connected therewith, and elsewhere.”

The promoters of this organization were largely, if not exclusively, persons heavily interested, directly or by representation, in transportation on the Great Lakes (notably of coal, oil, and ore); some being [736] interested in producing as well as in vessel owning and operating, others being interested in docking facilities. Through this syndicate, and on or before August 22, 1899, the Great Lakes Towing Company purchased the properties (in case of corporate vendors, their entire capital stocks or properties, or both) of the various tug owners and operators mentioned in the margin of this opinion,¹ these purchases embracing 74 tugs, 6 lighters, and 1 scow. The aggregate net purchase price paid for these properties, as indicated by journal entries on the books of the Great Lakes Towing Company, was \$3,112,930.92, the vendors receiving, in cash value, much less than the prices so indicated, in many cases receiving preferred stock in whole or in part payment, and not usually any considerable amount of common stock, which latter carried the voting power; the control being held by the promoters and those having like interests. Later in 1899 and in the early part of 1900, the Great Lakes Towing Company bought the properties of still other tug owners, and operators, whose names are given in the margin,² such added

¹ The Maytham Tug Line, the Hand & Johnson Tug Line, Ash and others, Ashtabula Tug Company, Vessel Owners' Towing Company, Thompson Towing & Wrecking Association, Soo River Lighter & Wrecking Company, James Davidson, White Line Towing Company, Inman Tug Company, and Barry Bros., Independent Tug Line.

² The Cleveland Tug Company, the American Transportation Company, the Westcott Wrecking Company, Ltd. (whose name was thereupon changed to the Great Lakes Towing Company, Ltd.), the Dunham Towing & Wrecking Company, the Escanaba Towing & Wrecking Company, Dewhirst and others, Sault Ste. Marie Tug Company, Hartman and others, and Gilchrist.

Opinion of the Court.

dors (and if corporate, usually their managers and principal stockholders as well) were required to and did agree in writing that during the succeeding five years they would "in all proper ways in their power, aid and assist the party of the second part (the Towing Company), its nominees, successors, and assigns, in retaining, extending, and successfully prosecuting the business" formerly conducted by the vendor; and that during the same period of five years they would not "directly or as shareholders, in or by or through any interest in any corporation, partnership, or association, engage in or be interested, directly or indirectly, in the business of *towing and wrecking* or in any branch thereof, *upon the Great Lakes*, their harbors, connecting, and tributary waters (except Lake Ontario and its harbors and the waters east thereof), excepting only and so far as they, or either of them, shall be interested in or with the party of the second part, as shareholder or employee." The Towing Company, at and within a few months following its organization, bought apparently more tugs than needed to do all the business required at the 14 ports, if properly distributed. Occasionally the Towing Company made sales of tugs, but always under agreement of the purchasers (and with attempt to make such agreement follow the title) that the tugs should not be used in vessel towing *at any of the 14 ports in question*; other ports as well being usually included in the restriction.

In 1900 Maytham's Towing & Wrecking Company was organized at Buffalo, and after a bitter and expensive competition with the Towing Company, its property, including 18 tugs, was in the following year bought by the Towing Company. Soon thereafter, and in 1901, the Independent Towing Company was organized at Buffalo, and after a long and aggressive competition (which in three months of 1903 cost the Towing Company \$20,000, as compared with earnings in 1901) its property, likewise, was in 1903 bought by the Towing Company, and its manager taken into the latter's employ.

In connection with the purchase of the Independent Tug Company's property and business, an agreement was made with Sullivan for carrying on the towing business at Toledo

Opinion of the Court.

by a corresponding increase in facilities for loading and unloading, through the substitution of the clam shell (and its predecessor, the scoop bucket) for the former slow method of raising by crane or derrick buckets filled by hand in the vessel's hold. Defendants contend that the towing and wrecking facilities furnished at the important ports on the Great Lakes were totally inadequate to meet this increase in the size and number of vessels; that while there were frequently tugs enough in commission, if they could be utilized, to meet the demands for harbor towing, at many of the ports a ruinous system of cut-throat competition existed, whereby the larger tugs were used for "scout service" in meeting vessels many miles from the harbor, leaving small and insufficient tugs to do the actual harbor towing, this resulting in lack of system for furnishing tugs, absence of system of delivering orders to ships, and of uniform system for notifying incoming vessels where they belonged, accompanied by graft, lack of fixed tariffs, and by other demoralizing incidents; that at times competing concerns made arrangements for division of business, whereby each tug line was to do all the towing of vessels belonging to certain owners, the latter having nothing to say as to what tugs should serve them; that many of the tug companies were financially irresponsible, and vessel owners were thus left without adequate remedy for negligent or unskillful towing; that before the formation of the Great Lakes Towing Company some of the larger vessel interests were considering forming individual tug lines for their own [741] service. It is also contended that the ice breaking tug service at the great grain ports of Duluth, Chicago, and Buffalo was inadequate. It is shown that, in the organization of the Great Lakes Towing Company, vessel owners contributed allotted amounts and took corresponding portions of stock, the vessel owners being expected to give their business to the new association; that the promoters tried first to buy out all tug operators at ports where bulk freighters did much business, instead of driving such operators out of business. It is also shown that the Towing Company has so increased the power and changed the construction of ice breaking tugs as to lengthen the

Opinion of the Court.

tractor, constitutes an unreasonable restraint under the Sherman Act. *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865. The fact that the restraint of competition was not limited to the locality where the seller was doing business, but was made to extend to *all harbors* upon the Great Lakes (except Lake Ontario), tends to show an intention on the part of the Towing Company to get more than reasonable protection incidental to the good will of the business sold. Likewise the restrictions upon competition imposed in the case of all the joint operating contracts referred to were greater than necessary for the protection of the Towing Company's legitimate business interests at the *local service* points covered by such contracts. No more effective method could well be devised for unifying the towing interests in question than by combining in one corporation the stocks of a large number of other corporations creating such a comparatively vast capitalization and influence. Such unification, unexplained, justifies a presumption of an intent to dominate and control the towing facilities. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 884, Ann. Cas. 1912D, 734. The fact that the policy of the Towing Company's promoters was to buy out competitors, rather than to buy new tugs, and by competition compel the loss to other tug owners of their property, does not tend to negative an intent to create a monopoly. Such course, as avoiding expensive competition, was entirely consistent with an intent exclusively to occupy the field. A [748] wicked purpose to wreck the property and business of those then engaged in towing is not essential to a violation of the statute.

The Towing Company's object in employing the system of customers' exclusive contracts was clearly to make successful competition impossible. As written by the Towing Company's president during the competition at Buffalo in 1903:

"Some of the line managers, and a very large per cent of the vessel owners, have been induced to contract with this company, with the understanding that those who remained outside when the opposition was destroyed would have to pay the full tariff rates."

That these contracts greatly contributed to the suppression of competition is likewise clear. They enabled the Towing

Opinion of the Court.

this combination. Of the claim that the Towing Company was merely a mutual protective association, it is enough to say that defendants' contentions in this regard are not sustained. Not all, or even nearly all, vessel owners needing the service [744] in question were included as (or even invited to become) members of the association. Nor can we assent to the suggestion that the combination was not organized for profit. The betterment of the service was unquestionably one of its attractive features, and probably the leading one; but we are satisfied the promoters confidently anticipated a profitable operation, and that but for such anticipation the combination would not have been formed. Cogent evidence of this conclusion is found in the declaration of the Towing Company's directors on August 16, 1899, that the properties proposed to be taken by the syndicate—

"had made net earnings which in the aggregate would pay a fair interest on \$3,500,000 [much more than was proposed to be paid for the properties], which net earnings will undoubtedly be largely increased as a result of single management and of combined operation of the properties."

It is also to be noted that the officers reported to the stockholders in 1901 that the company had earned during the season of 1900, "in spite of a bitter competition" (principally the Maytham competition, it would seem), a net undivided profit of over \$90,000, after paying 7 per cent on the preferred stock. The dividend was passed, however, so as to leave the company strong to meet such competition the next season. We are satisfied that the Towing Company's operations have proved financially profitable to its stockholders.

The fact that the towing and wrecking service has been improved under the Towing Company's administration cannot legalize the combination if otherwise unlawful. Not only do good motives furnish no defense to a violation of the Anti-Trust act (*Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107), but we have no right to assume that the unsatisfactory conditions existing in 1899 could not have been eliminated by lawful and normal methods.

Opinion of the Court.

combination, with a large patronage fixedly secured through stockholding interests, the formation of another company equipped to do business at all 14 ports would seem a commercial and financial impossibility. The Towing Company seems to have appreciated this condition, for as early as April, 1900, its president wrote the local manager at Buffalo:

"I think you can safely assert that there is no one concern or combination of concerns that can carry out promises and take care of the vessel towing at all the ports all the time without at least 60 tugs. Taking all the tugs, outside our own, engaged in the vessel towing business, there is not one third of this number, including the poor ones, which are in a majority "

—and in August of that year, during the Maytham competition at Buffalo, the Towing Company's president did not believe that the Maythams, "notwithstanding their good reputation and conservative business principles," could "possibly induce capital to invest to the extent of \$200,000." Yet several times that sum was paid on the very first purchase of towing facilities made by the Towing Company.

It is urged that all vessel owners already enjoy all the rights which by the decree in the St. Louis Terminal case were given outside railroads, in that all such vessel owners are at liberty to buy stock in the Towing Company, upon the market, and thereby participate in the ownership and management of that company's business. But all may not be able to acquire large stock interests, and the rights of minority stockholders may well fail to assure that "equal control and management upon an equal basis" with all other vessel owners, including the stockholders in the Towing Company, which would be necessary to make the relief analogous to that required in the Terminal case. We see, however, no substantial analogy in this respect between the vessel owners here and the railroads in the Terminal case. The analogy is rather between the railroads there and the tug companies here.

We conclude that the Towing Company and the corporations controlled by it constitute a combination denounced by the Anti-Trust Act. We thus come to the question of the

Opinion of the Court.

remedy to be applied. The general principles affecting this subject are that the continuation of the prohibited acts should be forbidden, and that the combination should be so dissolved as to neutralize the force of the unlawful power; that this result should be accomplished with as little injury as possible to the interests of the general public, and with due regard to vested property interests innocently acquired. In cases where the illegality of the combination results alone from purely administrative conditions, which may be effectively eliminated, a prohibition of the offending practices may be sufficient to vindicate the statute. *Standard Oil case, supra*; *St. Louis Terminal case, supra*; *Union Pacific R. R. case, supra*.

The complete elimination of the offending administrative practices to which attention has been called, including (as the more prominent) customers' exclusive contracts and destructive rate competition (especially as applied to temporary rate reductions in particular harbors), and including all unfair advantages possessed by the Towing Company by reason of its size, financial strength, or connections, accompanied by the according of equal and "most favored" treatment to all vessel owners, regardless of the amount of their business, and whether or not they are stockholders in the Towing Company, and whether or not they in fact exclusively patronize that company wherever it does [747] business (thus, and in all other ways, safeguarding the rights of all others engaged or wishing to engage in towing), would greatly lessen the presently existing evils, and possibly might substantially remove them. But, having in mind the magnitude of the combination and the extent of its activities, and the fact that it was organized to secure a monopoly, as well as for the benefit and profit of its members, together with its present practical occupancy of the territory, thereby placing all would-be competitors at such great disadvantage as practically to deter them, in large measure, from entering the field; together with the further fact that the decree of this court commanding the cessation of purely administrative practices would not be self-executing—it seems unlikely that a decree merely enjoining admin-

Opinion of the Court.

first presented by it, and has offered no plan of dissolution. The Government suggests no plan, except dissolution by way of sale of the towing company's assets, urging that as the only remedy, and to be effected only through receivership (in the absence of the towing company's consent to a plan of dissolution), modifying its former position only by suggesting that the plan provide for the distribution of the property and business of the towing company among such number of separate, distinct corporations, of divergent ownership, as may be necessary to restore competitive conditions.

[1] The Anti-Trust Act contains in terms no provision for equitable relief to the public on account of violations of the act, except by way of injunction or prohibition. Section 4, which alone relates to the equitable remedy, invests the appropriate courts with "jurisdiction to prevent and restrain violations of this act." It is made the duty of the district attorneys, under the direction of the Attorney General, to "institute proceedings in equity to prevent and restrain such violations." The prescribed prayer of the petition is that "such violations shall be enjoined or otherwise prohibited," and provision is made for "such temporary restraining order or prohibition as shall be deemed just in the premises." While the power to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the legislative policy, as disclosed by the terms of the act, is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate.

In *United States v. Freight Association*, 166 U. S. at page 343, 17 Sup. Ct. 560, 41 L. Ed. 1007, injunction is spoken of as "more efficient than any other civil remedy." In the *Reading case*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, the only relief given, aside from cancellation of the 65 per cent contracts, was injunctive. In *Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, none but injunctive relief seems to have been given. Moreover, where dissolution of an offending combination seems to be required to the furnishing of complete relief, such requirement does not necessarily amount to more than that

Opinion of the Court.

employ of said persons so notified to withdraw from their employment, or that they will cause persons employed by others upon buildings where said persons so notified are doing work to withdraw from all work upon said building, and from inducing or attempting to induce any person or persons whomsoever to decline employment or cease employment or not to seek employment under any person, firm, or corporation because such persons, firm, or corporation may have made contracts or purposed to make contracts with complainants or may have purchased or purposed to purchase materials from the complainants, or because materials furnished by the plaintiff were being used on or in connection with some building where said persons were doing work, and from in any way inducing or attempting to induce any person or persons to refuse to install or work upon materials manufactured by your complainants, and from enforcing or attempting to enforce or threatening to inflict any injury, loss, penalty, or liability, whether in the nature of a fine, or suspension, or expulsion from any labor organization or otherwise against any person who works for your complainants or upon materials furnished by your complainants, or against any person who works for any employer who purchases materials from your complainants, or against any person who works upon any building where the materials of complainants are being installed or are about to be installed, and from making, communicating, or circulating any statement orally or in writing that the defendant or members of any union or workingmen will refuse to work upon any materials unless said materials are constructed under strict union conditions, and from requesting customers, or those who might become customers, of the complainants, to purchase their wood materials from or have their woodwork done by persons or corporations who use the union label of the United Brotherhood of Carpenters and Joiners of America or who operate their factories according to the rules and regulations of said Brotherhood, so that no controversy or difficulty can arise on account of non-union woodwork, and from using said label to obstruct and interfere [474] with the complainants' business and from combining, conspiring, and confederating together to refuse to work upon materials unless they are made under strict union conditions, and from publishing, circulating, enforcing, and attempting to enforce the provisions of section 52-C of the by-laws of the District Council of New York and vicinity, which is as follows:

" 'Any member proven guilty of using the product of any person, firm, or mill who have been declared unfair by their district council, or working for any person, firm, or mill who have thus been declared unfair shall be fined ten dollars (\$10) for each offence.'

"And from publishing, circulating, enforcing, and attempting to enforce section 78 of the by-laws of the District Council of New York and Vicinity, which is as follows:

" 'Any person of this United Brotherhood who is required to put up material not bearing this union label (meaning the carpenters'

Opinion of the Court.

restrain defendant from keeping a house of ill fame, made a misdemeanor by section 322 of the Penal Code. So far as this was a common nuisance, it was for the public authorities to suppress it, and the defendant contended that the plaintiff could not maintain a civil action. Judge Gray said:

"If the business complained of is a lawful one, the legal question presented in a civil action for private damage is whether the business is reasonably conducted, and whether, as conducted, it is one which is obnoxious and hurtful to adjoining property. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit, or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner. The principle has been long settled that the objection that the nuisance was a common one is not available, if it be shown that special damage was suffered. *Rose v. Miles*, 4 M. & S. 101; *Rose v. Groves*, 5 Man. & G. 618; *Francis v. Schoellkopf*, *supra* [53 N. Y. 152]; *Lansing v. Smith*, 4 Wend. [N. Y.] 9 [21 Am. Dec. 89]. * * *

"In the present case the indecent conduct of the occupants of the defendant's house and the noise therefrom, inasmuch as they rendered the plaintiffs' house unfit for comfortable or respectable occupation, and unfit for the purposes it was intended for, were facts which constituted a nuisance, and were sufficient grounds for the maintenance of the action. If it was a nuisance which affected the general neighborhood and was the subject of an [478] indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for an injury sustained and to their equitable right to have its continuance restrained."

This case was cited with approval in *Re Debs*, 158 U. S. 564, at page 593, 15 Sup. Ct. 900, 909 (39 L. Ed. 1092); Mr. Justice Brewer saying:

"Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive power of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law. Thus, in *Cranford v. Tyrrell*, 128 N. Y. 341, on page 344 [28 N. E. 514, 515],

Statement of the Case.

The case then came on for trial upon the merits on October 13, 1909, and, with various adjournments, lasted until February 4, 1910, when the court directed a verdict for the plaintiffs, sending to the jury the question of damages only, which they assessed at \$74,000, which was trebled under the law.

The defendant then sued out a writ of error and this court, being of the opinion that the question of the defendants' liability should have been submitted to the jury, reversed the judgment and remanded the case for a new trial. A petition for a rehearing was denied by this court, 187 Fed. 522, 527, 109 C. C. A. 288. The plaintiffs thereafter petitioned the Supreme Court for a writ of certiorari which was denied, 223 U. S. 729, 32 Sup. Ct. 527, 56 L. Ed. 633. The new trial was commenced on August 26, 1912, and on October 11th a verdict was rendered for the full amount demanded. The sections of the Anti-Trust Act which are involved are the first, second, and seventh. They are as follows:

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Syllabus.

dealers to Loewe & Co., were admissible. 3 Wigmore, Evidence § 1729 (2). We need not repeat or add to what was said by the Circuit Court of Appeals with regard to evidence of the payment of dues after this suit was begun. And in short neither the argument nor the perusal of the voluminous brief for the plaintiffs in error shows that they suffered any injustice or that there was any error requiring the judgment to be reversed.

Judgment affirmed.

**FLEITMANN v. UNITED GAS IMPROVEMENT CO.
ET AL. (two cases).***

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

[211 Fed. Rep., 103.]

MONOPOLIES (§ 28)—ACTIONS FOR DAMAGES—FORM OF REMEDY.—

Under the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202) § 7, providing that any person injured by any violation of that act may sue therefor and recover threefold the damages by him sustained, the action to recover treble damages must be an action at law in which defendants have the constitutional right to a jury trial, and hence a minority stockholder in a corporation could not maintain a suit in equity on behalf of the corporation for such relief upon the corporation's refusal to sue.^b

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to Chicago Wall Paper Mills v. General Paper Co., 78 C. C. A. 612.]

MONOPOLIES (§ 28)—ACTIONS FOR DAMAGES—FORM OF REMEDY.—

Where the sole relief prayed in a bill by a minority stockholder of a corporation was that the defendants be decreed to pay over to the corporation treble the damages sustained by a violation of the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), it could not be construed as a bill to require the corporation, which was made a party, to sue the other defendants for such damages.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

* For opinion in the Supreme Court (240 U. S., 27), see *post*, page 429.

^b Syllabus copyrighted, 1914, by West Publishing Company.

Statement of the Case.

rations, the conspiring defendants endeavored to monopolize interstate commerce in the materials necessary for carrying out public lighting contracts. That these defendants, realizing that the Consolidated Company would be a strong competitor in the business of municipal lighting, agreed and conspired together to prevent the Consolidated Company from carrying on such business in the United States and to drive said company out of business. It is alleged further that, in pursuance of the said conspiracy, the said defendants acquired, through fraud and fraudulent representations, a majority of the stock in said Consolidated Company and placed in control thereof creatures of their own and adopted every method in their power to wreck and destroy the said Consolidated Company. That they succeeded in accomplishing this result and, in 1910, caused the Consolidated Street Lighting Company to discontinue its operations and abandon its business; the result being that the business has been destroyed and the stock is worthless. The bill also alleges that prior to this suit, the plaintiff demanded of the officers of the Consolidated Company that they would bring an action asking relief similar to that now demanded, but they have refused to bring such action. It is alleged that but for the unlawful acts of the defendants, the property, good will, and assets prior to the commencement of this suit would have been worth \$1,000,000.

The foregoing statement shows sufficiently the intent and purpose of the action.

The question presented by these motions, briefly stated, is whether, when it appears that a number of individuals and corporations have conspired together to wreck a corporation and have succeeded in doing so, a single minority shareholder of such corporation, after the directors and majority shareholders have declined to act, can maintain a suit in equity and recover threefold damages against the conspirators under section 7 of the Anti-Trust Act.

So far as the seventh section of the act is concerned, it has been uniformly construed to refer only to an action at law. It permits a person—which word, by the eighth section, includes a corporation—to bring an action at law to recover treble damages. Nowhere in the act is the right given to an individual to proceed in equity. *Blindell v. Hagan* (C. C.), 54 Fed. 40; s. c., 56 Fed. 696, 6 C. C. A. 86; *Greer, Mills & Co. v. Stoller* (C. C.), 77 Fed. 1; *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407, 30 C. C. A. 142; *National Fire Proofing Company v. Mason Builders' Association et al.*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

In *National Fire Roofing Co. v. Mason*, cited above, the Circuit Court of Appeals for this circuit said, at page 263 of 169 Fed., at page 539 of 94 C. C. A. (26 L. R. A. [N. S.] 148):

“With respect to the Federal statute, it is not obvious in what way a trade agreement between builders and bricklayers, relating to their work in the State of New York, can be said to directly affect

Opinion of the Court.

appeal to the Circuit Court of Appeals was holding that such a suit in equity could not be maintained by a single stockholder; that was the only question dealt with by the District Court and that was the ground of decision in the Circuit Court of Appeals. It really is the only question in the case.

Of course the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. Therefore the inquiry at once arises why the defendants' right to a jury trial should be taken away because the present plaintiff cannot persuade the only party having a cause of action to sue—how the liability which is the principal matter can be converted into an incident of the plaintiff's domestic difficulties with the company that has been wronged.

No doubt there are cases in which the nature of the [29] right asserted for the company, or the failure of the defendants concerned to insist upon their rights, or a different State system, has led to the whole matter being disposed of in equity; but we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary it plainly provides the latter remedy and it provides no other. *Pollard v. Bailey*, 20 Wall. 520. Even the act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737, passed since this suit was begun, does not go farther in terms than to give an injunction to private persons against threatened loss.

It now is suggested, evidently as an afterthought since the decision in the District Court, that there might be a decree directing the corporation to sue or, if it fails to do so, permitting the plaintiff to sue in its name and on its behalf. But the bill is not framed for that purpose, as the court below held.

Decree affirmed.

Mr. Justice McKenna and Mr. Justice Pitney dissent.

Opinion of the Court.

a line from Buffalo to Chicago, which, separately owned, would compete with the line from Buffalo to Chicago, which will be formed by the consolidation of the two defendants. It also appears that the defendant, the New York Central & Hudson River Railroad Company, is the owner of the capital stock of the Western Transit Company, which owns a line of steamships operating between Buffalo and Chicago, and which would, separately owned, compete with the consolidated line. The defendant, the Lake Shore & Michigan Southern Railway Company, also owns the New York, Chicago & St. Louis Railroad Company, which is a practically parallel line to it from Buffalo to Chicago. It is by virtue of this situation that the plaintiffs contend that the proposed consolidation will continue and perpetuate the existing control of all four lines in the consolidated company, and so operate in violation of the Sherman Law.

The defendants' reply to this contention that: (a) It is the well-settled rule in the second circuit that a suit in equity under the Sherman Law will only lie at the instance of the United States; (b) that the bill and affidavits fail to show any restraint or monopoly of interstate transportation arising out of the proposed consolidation; (c) that the control, which is alleged to be in violation of the law, already existed for many years before the plan of consolidation was considered, and would not be intensified by the completion of the plan; and (d) that the former control is changed by the plan of consolidation in form only, and not substantially in degree, and that the United States has for years acquiesced in that control, through failure of the Department of Justice to act, and affirmatively through the approval of the Interstate Commerce Commission.

[2] (a) The plaintiffs contend that the bill is not a suit in equity under the Sherman Act, and that the decisions from the second circuit, relied upon by the defendants, do not therefore apply. It seems to me that the plaintiffs' contention is correct. The present suit is one by a dissenting minority stockholder to restrain the majority stockholders from accomplishing what is asserted to be an illegal or ultra vires act. It is, therefore, a well-recognized species of general

Syllabus.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

For other definitions, see Words and Phrases, First and Second Series, Restraint of Trade.]

[508] MONOPOLIES (§ 14—ANTI-TRUST ACT—ACTION CONSTITUTING “RESTRAINT OF TRADE.”—The mere fact that a manufacturing corporation has largely increased its business, either by enlarging its plants or purchasing the plants and business of other concerns, if they are acquired openly and by proper methods, does not effect an undue “restraint of trade,” within the meaning of Sherman Anti-Trust Act, §§ 1, 2, where the volume of production is not lessened, but increased, prices are not inflated, and the power given by the volume of business is not improperly used to injure either competitors or the public.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. § 14.]

MONOPOLIES (§ 17)—ANTI-TRUST ACT—ACTS CONSTITUTING RESTRAINT OF TRADE.—Defendant, the Keystone Watch Case Company, acquired the plants, business, and good will of several manufacturers of filled watch cases and also of two or three manufacturers of watch movements. All of the plants so purchased were continued in operation and their production increased. After it had acquired and was operating such plants, its board of directors adopted and it issued to a large number of the prominent jobbers and wholesale dealers in the United States, a circular in which it stated its intention to thereafter sell its products only to those dealers who voluntarily conformed to its wishes, which were (1) that certain of its cases and watches, which were not patented, should be resold only at such prices as it should fix, and (2) that dealers to whom it sold the same should not deal in any cases except those made by it. It then proceeded to strictly enforce such policy, to which some of the jobbers conformed, while those who refused were cut off from purchasing the Keystone products, which constituted perhaps 50 per cent of those in the market. *Held*, that while, up to that time, there was nothing unlawful in its acts, the adoption and enforcement of such policy operated as a direct and unlawful restraint upon interstate trade, in violation of Sherman Anti-Trust Act, §§ 1, 2.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

MONOPOLIES (§ 17)—ANTI-TRUST ACT—UNLAWFUL RESTRAINT OF TRADE.—Defendant made a watch movement known as the “Howard,” which was a high-grade watch, material parts of which were covered by valid patents. Defendant made direct agreements with the jobbers to whom it sold the watch, fixing the price at which they might sell to retailers, and also by a mere notice on

Syllabus.

the boxes in which the watch was sold to retailers attempted to fix the price at which they should sell. *Held*, that the agreement with the jobbers was within its rights under the patent law, but that when it sold to the jobber it had fully exercised its right, and its notice to subsequent purchasers was an unlawful restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

MONOPOLIES (§ 12)—UNLAWFUL RESTRAINT OF TRADE—STANDARD FOR DETERMINING.—Whether a combination or course of action is unlawful, as likely to effect an unreasonable restraint of trade, where those engaged in it have made no declaration of its purpose, must be determined in the light of past experience and observation; but if, at the time the question is submitted for decision, it has already been in effect for a sufficient length of time, the question may better be determined by the effect it has actually produced.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

[504] **MONOPOLIES (§ 12)—UNLAWFUL RESTRAINT OF TRADE—STANDARD FOR DETERMINING.**—While a large increase in the business of a manufacturer necessarily results in a restraint of the trade of competitors, the business is not for that reason, nor because of its size alone, to be condemned as unlawful; but it is unlawful, as an unreasonable restraint, if the growth has been accomplished by fraudulent, unfair, or oppressive methods against competitors, by arbitrarily fixing or maintaining prices, by limiting production or otherwise, by deteriorating the quality of the article produced for the same price, or by arbitrarily reducing the wages of workmen or the price of raw material.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 12)—ANTI-TRUST ACT—RESTRAINT OF "TRADE."—The prohibition against restraint of "trade," embodied in Sherman Anti-Trust Act, §§ 1, 2, is directed to the business of buying or selling for gain, whenever the transaction forms a part of commerce among the States or with foreign countries.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

For other definitions, see Words and Phrases, First and Second Series, Trade.]

MONOPOLIES (§ 12)—ANTI-TRUST ACT—RESTRAINT OF TRADE—"RESTRAINED."—Trade may be "restrained," within the meaning of Sherman Anti-Trust Act, §§ 1, 2, by being hindered, obstructed, or destroyed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

Opinion of the Court.

to restrict the prices at which the wholesaler or jobber might sell to the retailer, and to this end made a direct agreement with the jobber. As we understand the decisions, such an agreement was within the company's lawful rights. Certain material parts of the Howard watch were covered by bona fide patents taken out and used for a lawful purpose, and as the owner of these patents the company had the right to make a direct agreement with the jobbers whereby a minimum price was fixed at which the jobber might sell. *Bement v. Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Henry v. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. But the company went further, and by mere notice to the retailer, accompanying the box in which the watch was sold by the jobber, attempted to fix the minimum price at which the retailer might sell to the consumer. No direct agreement was made with the retailer. When the company sold the watch to the jobber it had fully exercised its right to vend, and had no right to use the notice subsequently given in order to control the price at which the retailer might sell. *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185.

We should end the discussion at this point, if it were not for the recent decision in *U. S. v. Harvester Co.* (D. C.), reported in 214 Fed. at page 987. The majority opinion, as we understand it, is put upon the ground that the combination there in question—which was made in 1902, but was not proceeded against until 1912—was and continued to be unlawful because at the beginning it suppressed competition between corporations that controlled about 80 per cent of the trade in harvesting machines. This conclusion was reached, although there was no evidence of coercion in the original combination, and no evidence of oppression or of actual injury to trade in the subsequent conduct of the business. In the principal opinion, Judge Smith says:

“ While the evidence shows some instances of attempted oppression of the American trade by the International and the American Companies, such cases are sporadic, and in general their treatment of their smaller competitors has been fair and just; and if the International and American companies were not in themselves unlawful there

Opinion of the Court.

is nothing in the history of the expanding of the lines of manufacture, so as to make an all the year around business, that could be condemned.

"The real question is whether the combination of the companies was illegal in the beginning, or became so with the additions subsequently made."

And Judge Hook in his concurring opinion takes the same ground, saying (214 Fed. 1001):

"The International Harvester Company is not the result of the normal growth of the fair enterprise of an individual, a partnership, or a corporation. On the contrary, it was created by combining five great competing companies, which controlled more than 80 per cent of the trade in necessary farm implements, and it still maintains a substantial dominance. That is the controlling fact; all else is detail. * * *

"It is but just, however, to say and to make it plain that in the main the business conduct of the company towards its competitors and the public has been honorable, clean, and fair. Some petty dishonesties were tracked in at the start, mostly by subordinates who had been in the service of the old [515] companies; but they were soon gotten rid of. In this connection it should also be said that specific charges of misconduct were made in the Government's petition which found no warrant whatever in the proof. They were of such a character, and there was so much of them, apparently without foundation, that the case is exceptional in that particular."

Judge Sanborn dissented, on the ground that as the suit was in equity the court had no power to punish past violations of the Anti-Trust Act, but was only authorized to prevent and enjoin further acts violative thereof; taking the position that the question for decision was whether at the beginning of the suit in 1912 the Harvester Company was unreasonably restraining, or attempting to restrain or monopolize, interstate or foreign trade. In considering this question he laid stress upon the argument that the statute forbids such acts only as injure the public unduly in some of the following particulars:

"(1) Raising the prices to the consumers of the articles they affect;

"(2) Limiting their production;

"(3) Deteriorating their quality;

"(4) Decreasing the wages of the laborers and the prices of the materials required to produce them; or

"(5) Practicing unfair and oppressive treatment of competitors."

Opinion of the Court.

of course is reason, but various questions at once present themselves for answer. For example, who is to apply the standard? The legislation of Congress does not attempt the task itself, and under our system of government the duty must of necessity be undertaken by the courts, who must judge each case according to its own facts. But when such a question comes to be considered, where is a court to find the standard of reason? It seems to us that it must be found in the gradually accumulated results of general experience and observation, in the gathered wisdom of the community, for this is the product of a common and a prolonged effort by men who theorize and by practical men alike to deal as fairly, as justly, and as equitably as may be possible with situations that are often obscure and complicated, and of high importance to large classes and to many individuals. Obviously a standard [517] should have a true relation to the subject measured; and, since the inquiry here is whether in a given case trade is likely to be, or has actually been, unduly restrained, reason can answer the question only by going to the facts of life and drawing upon the accumulated store of knowledge.

Now, the world has already learned some lessons that have become part of its common stock. One of them is that, when men announce their intention of entering upon a given transaction, declaring it to be the accomplishment of a particular object, their declaration may usually be accepted as correct. Not always, of course, but as a rule; and especially is this true if the concealment of their intention would advance their interest. Let us suppose that several persons combine to do certain acts that may or may not have the effect of restraining trade. If they expressly declare their intention to be the restraint of trade, we shall hardly go wrong in believing them. And if such a situation be unlikely, a better illustration may be found in supposing that they agree to do the acts, but say nothing about their intention. In that event, if according to the common course of experience and observation the acts proposed will certainly have the result of restraining trade, their unexpressed intention will be of no consequence whatever; neither will it be

Opinion of the Court.

sonal investigation, supplemented by a great body of formal sworn testimony, sifted, and tested by severe and exhaustive cross-examination, this commission has arrived at the unanimous conclusion that the general surroundings of the miners on Paint Creek and Cabin Creek, respectively, are very good when compared with those of the miners of the few unionized plants on the right bank of the Kanawha and with those of the miners throughout the State and Nation. We have gone into their houses and carefully examined them. They are above the average of miners' homes in most places."

And as to wages:

"A careful consideration of the evidence adduced leads us to the following conclusions: (1) The average annual wage of miners in West Virginia for the years 1905-1911, inclusive, is \$554.26. (2) The average annual wage of miners on Paint Creek and Cabin Creek is from \$600 to \$700. (3) The average wage on Paint Creek and Cabin Creek (non-union) is fully equal to if not greater than that of the miners in the very limited number of unionized plants, in the State on the opposite bank of the Kanawha River. These figures may appear small and inadequate, but, slender as they are, they exceed the average wage obtained in Illinois, a unionized State, which is but \$510.86 a year. We have been unable to secure any official figures as to the average annual wage in the unionized States of Indiana, Western Pennsylvania, and Ohio. But we are informed by experts, and we believe, that the average wage in the two States first mentioned probably falls a little below that prevailing in Illinois; while the annual wage in Ohio, owing to local mining conditions, falls a little below those of Western Pennsylvania. This classification, in the order of the rewards of labor, puts West Virginia at the head of the list. If we inquire into these figures more closely, we find they are very substantially affected by several causes, among which comes first the unwillingness of a large number of the miners to work more than four days a week at the most. A minute examination of the pay rolls discloses the fact that 16 or 17 days in the month constitute a high average, and that many engaged in the mines decline to labor more than [548] 12 or 14 days. This is particularly true of some of the native-born miners and many colored men, and results in the necessity of keeping 20 or 30 per cent. more miners in a given operation than would be required if steady application to work were the rule. At several of the mines in the districts under investigation were found men wholly illiterate, and without any special knowledge or skill other than that acquired by their daily experience, earning \$4 to \$5 and in some cases even \$6 a day of eight or nine hours, men with savings bank accounts of \$1,000 to \$2,000, and others who had purchased out of their savings small farms or other properties adjacent to the mines."

Opinion of the Court.

one or more of his rival operators in business in the same district. In all these particulars these provisions violate the law, guaranteeing under our free government the rights of both the labor and capital involved, and, further, the rights of the public consuming the product of such labor and capital. But still further, and what manifestly is of far more vital importance, under the power so assumed by this close and compact organization, and by reason of these obligations and rules enforced by it upon its members, it is more than probable that, if allowed to unionize and control the mining operations in West Virginia, it will be entirely able to fulfill its express contract of 1898 with its co-conspirators, the operators of Ohio, Western Pennsylvania, Indiana, and Illinois, and "protect" them from the competition of West Virginia coals, restore to them their lost markets, and practically destroy the coal mining industry of this State to accomplish which the union has admittedly already spent hundreds of thousands of dollars and sacrificed human life as yet to no avail. It is not to be assumed that, because I have not discussed other of the rules and purposes of this organization, that I have ignored their meritorious and beneficent character; nor that I have not considered the very natural and human instinct inspiring the officers and members of this union, resident in other States and laboring under physical disadvantage in mining conditions, to regard their personal interests as paramount. Most of its officers have testified in open court before me, and have fully convinced me that they are men sincere in the conviction of the integrity of their action, perfectly frank and truthful in their testimony, self-educated, and who have by their own effort rightly acquired the leadership in their life work. So far as I am concerned, the law requires me to consider these rules of the organization, and ascertain whether any of them are unlawful in character. If so, whether the unlawful ones dominate the actions and purposes of the organization, [552] or whether the purposes contemplated by the unlawful ones are so intermingled with those designed by the lawful ones as to render separation impracticable. If such domination of the unlawful prevails, or such separation cannot be made, then,

Opinion of the Court.

induced to become members of the United Mine Workers, and the next morning they were discharged by the superintendent of the Hitchman Company. This was in the latter part of September or the first of October, 1907. [695]

We fully appreciate the important bearing the questions here presented have upon the welfare of the mine owners, as well as the laboring men, and are not unmindful of the delicate issues raised by the pleadings and proof in this cause.

That it is advisable to secure a just and fair solution of the labor problem by which equal protection to capital and labor may be secured is undoubtedly the wish of every patriotic citizen, regardless of his station in life. That one who toils for his living is justified in employing all lawful methods for the preservation of his right as an American citizen to secure fair remuneration for his services is established by the Federal and the State courts. That such a person also has the right to join with others similarly situated, in order to promote their welfare as a class, is also established as the law of this country. But while this is so, it is equally well settled that the mine owner is entitled to the full protection of the law in the conduct of his business and the enjoyment of his property.

It is insisted by counsel that the defendants as members of the organization known as the United Mine Workers of America have been within their rights as to the transactions referred to in the bill, and that they have not resorted to intimidation, violence, or other unlawful methods, but, on the other hand, have been actuated solely by a desire to promote the general welfare of those who are employed as laborers in the various coal mines of the country, and that they have not at any time attempted to unionize plaintiff's mine as alleged in the bill.

The plaintiff insists that it has the right to employ only non-union labor, and that the conduct of the defendants in attempting to unionize this class of labor in the State of West Virginia is unlawful in that it is a violation of the constitution, the common law, and the statute law of that State.

Opinion of the Court.

At the final hearing the plaintiff introduced certain documentary evidence bearing upon the question as to whether the defendants had entered into a combination with operators and coal producers in Ohio, Western Pennsylvania, Illinois, and Indiana, competitive fields, to compel the plaintiff to submit to contractual relations with the United Mine Workers of America relating to the employment of labor and production, contrary to the wishes of plaintiff.

This evidence was offered in support of plaintiff's oral testimony, and consisted of the proceedings of the various joint conferences of coal operators and coal miners of the States in question, held during the years 1906, 1907, 1908, 1910, and 1911. Also, book entitled "Official Mining Scale of Association of Pittsburgh Vein Operators of Ohio for their Mines in Belmont, Harrison, and Jefferson Counties, Ohio, and the United Mine Workers of America." Also, book entitled "United Mine Workers of America, District No. 6, Ohio, Issued by the Authority of the Executive Board of District No. 6 (Ohio Members), United Mine Workers of America. G. W. Savage, Secretary-Treasurer. For Scale Year, April 1, 1908, to March 31, 1910." Also, book entitled "Detailed Mining Scale for Sub-district 5 of District 6, U. M. W. of A. Effective from April 1, 1910, to March 31, 1912." Also, "Excerpts from President T. L. Lewis' Report to the Twentieth Annual Convention of the United Mine Workers of America, Held at Indianapolis, Indiana, in January, 1911, as Published in the United Mine Workers Journal in its Issue of January 19, 1911." Also, "Expenditures of the United Mine Workers of America for the Year 1910." Also, "Income of the United Mine Workers for the Year 1910."

Thirteen exhibits of this kind were introduced over the objections of counsel for defendants.

The court in referring to this phase of the question said:

"I further conclude that this union, in pursuit of its unlawful purposes to secure control and the monopoly of mine labor, and to restrain, suppress, if not destroy, the coal mining industry of West Virginia in the interest of the co-conspirators, rival operators, and producers in Ohio, Western Pennsylvania, Illinois, and Indiana,

Opinion of the Court.

as the companies named did in effect unite, the sole question is as to whether they would have agreed on prices and what collateral services they could render, when their companies were all prosperous and they jointly controlled 80 to 85 per cent of the business in that line in the United States. We think they could not have made such an agreement. *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; *Id.*, 148 Fed. 939, 78 C. C. A. 567, 19 L. R. A. (N. S.) 143; *Addyston Pipe Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

If the five companies which formed the International had been small, and their combination had been essential to enable them to compete with large corporations in the same line, then their uniting would, in the light of reason, not have been in restraint of trade, but in the furtherance of it; but when they constituted the largest manufacturers of [1000] their articles in America, if not in the world, and held jointly about 80 to 85 per cent of the trade, and two at least of the companies forming the combination were prosperous, their combining was, when similarly viewed, an unreasonable restraint of trade. If the business of the separate companies combining was unsuccessful, it could be claimed that their combination was reasonable, in view of the rule of reason as proclaimed by the Supreme Court; but it is conceded that the McCormick and the Deering Companies "had established reasonably successful and prosperous businesses," so that question is eliminated.

There is no limit under the American law to which a business may not independently grow, and even a combination of two or more businesses, if it does not unreasonably restrain trade, is not illegal; but it is the combination which unreasonably restrains trade that is illegal, and if the parties in controversy have 80 or 85 per cent of the American business, and by the combination of the companies all competition is eliminated between the constituent parts of the combination, then it is in restraint of trade within the meaning of the statute, under all of the decisions.

Hook, C. J., concurring.

Tobacco Co., 221 U. S. 106, 181 [31 Sup. Ct. 632, 649 (55 L. Ed. 663)]. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be of some good results. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 [17 Sup. Ct. 540, 41 L. Ed. 1007]; *Armour Packing Co. v. United States*, 209 U. S. 56, 62 [28 Sup. Ct. 428, 52 L. Ed. 681]."

We conclude that the International Harvester Company was from the beginning in violation of the first and second sections of the Sherman Law, and that this condition was accentuated by the reorganization of the America Company and by the subsequent acquisitions of competing plants, and that all the defendant subsidiary companies became from time to time parties to the illegal combination, and the defendant companies are combined to monopolize a part of the interstate and foreign trade. It will therefore be ordered that the entire combination and monopoly be dissolved, that the defendants have 90 days in which to report to the court a plan for the dissolution of the entire unlawful business into at least three substantially equal, separate, distinct, and independent corporations, with wholly separate owners and stockholders, or in the event this case is appealed and this decree superseded, then within 90 days from the filing of the procedendo or mandate from the Supreme Court the defendants shall file such plan, and in case the defendants fail to file such plan within the time limit the court will entertain an application for the appointment of a receiver for all the properties of the corporate defendants, and jurisdiction is retained to make such additional decrees as may become necessary to secure the final winding up and dissolution of the combination and monopoly complained of, and as to costs.

Hook, Circuit Judge (concurring):

I concur in the foregoing opinion. The International Harvester Company is not the result of the normal growth of the fair enterprise of an individual, a partnership, or a corporation. On the contrary, it was created by combining five great competing companies which controlled more than 80 per cent of the trade in necessary farm implements, and

Sanborn, C. J., dissenting.

ternational Company must be divided into at least three substantially equal and independent parts, or placed in the hands of a receiver under a decree of this court, because in 1902 five companies theretofore engaged in the manufacture and sale of harvesting machinery, controlling about 85 per cent of the interstate and foreign trade therein, combined in the International Company, ceased and have not since resumed competition among themselves. With profound respect for their judgment, I find myself forced to dissent from it: (1) Because it seems to me to give insufficient consideration to the trade conduct of the defendants at the time this suit was commenced in April, 1912, and for seven years before that date; (2) because the crucial issue in this case is not whether or not in 1902 or 1903 the defendants or their predecessors, by reason of the suppression of competition between five or more companies, made a combination or an attempted monopoly in restraint of trade, but it is whether or not ten years afterwards, in 1912, when the complaint in this suit was filed, the International Company and the other defendants were then unduly or unreasonably restraining or monopolizing interstate or foreign trade, or threatening so to do; and (3) because the evidence in this case has forced upon my mind the deep and abiding conviction that, for at least seven years before the commencement of this suit, the defendants had not been, and then were not, either so doing or threatening so to do.

1. Conceding, but not admitting, that if the combination of 1902 and 1903 had been challenged in 1903 or 1904, before the actual effect of the conduct of its business by the defendants upon interstate and foreign trade had been demonstrated by the actual trial of it from 1905 to 1912, a court might have presumed that the defendants were violating the Anti-Trust Law, and have so found on the theory that those who have power to violate a law are presumed to do so, yet the demonstration by actual trial, which the evidence seems to me to present, that at the time this suit was commenced the defendants were, and for [1003] at least seven years before that time had been, conducting the business of the International Company and their business without

Sanborn, C. J., dissenting.

2. The controlling issue in this case is not what combination or monopoly was made in 1902, 1903, or 1904, nor whether or not that combination was violative of the Anti-Trust Law. It is: Were the defendants in 1912 doing or threatening to do acts which so unreasonably restrained or monopolized interstate or foreign trade that it is the duty of this court of equity to enjoin and prevent their future performance? Sections 1 and 2 of the Anti-Trust Law forbid combinations and monopolies in undue restraint of interstate or foreign trade, and prescribe punishment by fine or imprisonment, or both, for any violation thereof; and section 725 of the Revised Statutes (U. S. Comp. St. 1901, p. 583) bars any prosecution under these acts for such violations three years after they are committed. 26 Stat. 209, c. 647, §§ 1, 2, and 4; Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725); 3 Comp. St. 3200 and 3201; 1 Comp. St. 725, § 1044. If, therefore, a combination or monopoly, in unreasonable restraint of trade, was made in [1004] 1902, 1903, or 1904, the proceedings to punish for the making thereof were barred many years before this suit was commenced.

Section 4 of the act gives jurisdiction to this court "to prevent and restrain violations of this act," but it grants this court no power to punish past violations thereof. This suit is not a proceeding to punish the defendants for deeds done in the past. It is a suit in equity under section 4 to prevent and restrain future violations of the Anti-Trust Law. It looks to the future, not to the past, and this court is not only without jurisdiction to punish defendants for past violations of this law, but persons who at some past time combined to unreasonably restrain or monopolize interstate or international trade were not thereby deprived of their right thereafter and now to conduct such trade in obedience to the law. *New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Comm.*, 200 U. S. 361, 404, 26 Sup. Ct. 272, 50 L. Ed. 515; *United States v. Standard Oil Co.* (C. C.), 173 Fed. 177, 190, 191. This suit, therefore, is nothing more than an appeal to the consciences of the members of this court of equity to prevent and enjoin

Sanborn, O. J., dissenting.

884, Ann. Cas. 1912 D, 734; *United States v. American Tobacco Co.*, 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663. Trade is the making and enforcing of contracts. And it necessarily follows, from the rule laid down in the excerpt just quoted from the opinion of the Chief Justice, that the Anti-Trust Act evidenced the intent not to restrain, and that it does not restrain, the trade or business of the defendants, "whether resulting from combination or otherwise," unless that trade or business is conducted by methods which constitute an interference which is an undue restraint of interstate or foreign commerce.

It is equally well established that the reason for the prohibition by the English rule of public policy and by the statute under consideration of unreasonable restraints of and attempts to monopolize trade was and is that, by unduly restricting competition, they are injurious to the public in that (1) they raise the prices to the consumers of the articles they affect, (2) limit their production, (3) deteriorate their quality, and (4) decrease the wages of the labor and the prices of the materials required to produce them. *Standard Oil Co. v. United States*, 221 U. S. 1, 52, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. Undue injury in the ways just stated to the public (that is to say, to the consumers and makers of the articles produced or sold) is the basis and reason for the prohibition and the test of undue or unreasonable restraint or attempt to monopolize. And if in any individual case the weight of the evidence fails to prove that the defendants' conduct of their business is so restricting or threatening to restrict competition in the articles they make or sell as to unduly injure the public by (1) raising the prices of the articles to the consumers, or (2) limiting their production, or (3) deteriorating their quality, or (4) decreasing the prices paid for the labor or materials required to produce them, or (5) by unfair and oppressive treatment of competitors, neither undue nor unreasonable restraint of competition, nor of trade, nor undue attempt to monopolize is established. The reason for the rule and for the prohibition in the law does not exist, and the law is inapplicable. "Cessante ratione, cessat ipsa

Sanborn, C. J., dissenting.

their competitors, that they were not injuring the public by raising the prices to the consumers of the articles they made or sold, or limiting their production, or deteriorating their quality, or decreasing the wages of the laborers employed to make them, or the prices paid for the materials required to construct them, that they were not threatening to do these things, but they were doing the opposite of these things to the substantial benefit of their competitors, of the consumers of their products, of the laborers who make them, the men who furnish the material for [1012] them, and the public in general, because the acts of the defendants during these seven years do not constitute that undue or unreasonable restraint of or attempt to monopolize interstate or foreign trade forbidden by the Anti-Trust Act, and because, in my opinion, the prevention or restraint of these acts or this business of the defendants, or the splitting of their business and property into three or more independent parts, or the seizure of it by a receiver, by virtue of a decree of a court of equity, would not tend to prevent undue restraint of, or undue attempts to monopolize, interstate or foreign trade, but, on the other hand, would tend to produce or foster the very evils at which the Anti-Trust Act was leveled, to wit, the restriction or lessening of competition, the increase of the prices of the machinery and articles affected, the deterioration of their quality, the limitation or reduction of the product and the diminution of the wages of the laborers making them and of the prices of the materials required to produce them to the substantial injury of the public, I am unable to concur in the opinion or the decree against the defendants in this case. In my opinion, a decree should be rendered that the complaint in this suit be dismissed without prejudice to the right of the United States to bring another suit of like character against any of the defendants whenever any of them is found to be engaged in the commission of any acts in violation of the Anti-Trust statute.

Dodge, O. J., concurring.

out many competitors at exorbitant prices. There is a general charge of "many other unlawful acts too numerous to specify," and accordingly not specified, in the petition.

A long bill of particulars, containing alleged specifications of these charges, was filed upon the defendants' motion during the trial (June 25, 1913). But there are very many of the charges so specified in support of which no proof whatever has been offered. Of those to support which some evidence was introduced, comparatively few have been insisted on in argument. The charge that competitors have been bought out at "exorbitant prices" is found not established in the case of the Plant acquisition, as has just been stated. Nor is evidence found sufficient to establish it in the case of any one of the numerous minor acquisitions specified in the petition. It has not been insisted on in argument that this charge is proved as to any one of them.

Nor has there been any evidence sufficient to show a practice followed by the defendants of buying up patented inventions to hold in disuse. This charge also is one not insisted upon in argument.

The charge that rebates have been given to exclusive users of the United Company's machines rests upon (1) the vote of the executive committee January 29, 1900; (2) a circular letter addressed on the company's behalf to its lessees 10 years later—June 10, 1910. There is nothing sufficient to show that there was anything "unfair or monopolistic" about either the vote or the letter or about anything done in pursuance of either.

The vote in 1900 was that royalties on the Gem insole machines be rebated to exclusive users of the company's machines. It appears that, having acquired the Gem Company, which had machines in use under lease at the time at a royalty of one-half cent per pair, the United Company added the machine to its Goodyear auxiliary set, and to users of such sets paid back the one-half cent per pair in order to leave the rate upon the entire auxiliary set the same as before it included the Gem machine.

As to the circular letter of June, 1910, it announces the company's intention of investing 15 per cent of the royalties paid by lessees of the Goodyear welting, stitching, and turn

Brown, D. J., concurring.

entirely proper and normal contract. The matter can not be better stated than by Judge Putnam in *United States v. Winalow* (D. C.), 195 Fed. 578, 592:

"It seems to be impossible to deny that the combination of various elements of machinery, all relating to the same art and the same school of manufactures, for the purpose of constructing economically and systematically, and of furnishing any customer, the whole or any part of an entire system, is in strict and normal compliance with modern trade progress; as also it might be in strict compliance with modern progress to limit the manufacture and supply to certain details, as, for example, steam gauges, wheels for railroad cars, or axles for steam locomotives, without furnishing anything else, although by so doing the manufacturer of details becomes able to command the entire market. It is absolutely normal, and in accordance with the rightful demand of the market, for any dealer to supply mere details or an entire system of machinery, according as his customers may desire."

It may be admitted that the inducements offered by the United Company in the complete or partial installation of a machine.equipment on terms which relieve the manufacturer from the expense of an initial payment and from the loss by deterioration, make it a very formidable competitor. It may be assumed that the difficulty of introducing competing machines into factories so supplied is very great; but that this difficulty arises from the insertion of clauses in the leases which were directed at competitors, and were not inserted for the purpose of defining and securing a reasonable compensation to the defendants for the use of their patents and machinery, has not been made to appear.

The main purpose, to insure such permanency of the relation between lessor and lessees as has been agreed upon, being legitimate, and the judgment of a large number of practical men who have separately, and without concurrent action, accepted what was offered them by the United Company upon the terms offered, being the best proof of the reasonableness of these terms, we must hold that the difficulty of a competitor arises from the fact that customers are already supplied rather than from any provisions designed to hold these customers to what they have agreed to, or which provide for the termination of the leases and the freeing of the manufacturer from his contracts with the United Company.

Syllabus.

The defendants very forcibly contend that no decree for the United States can be based upon the leases alone, as an independent ground for relief, for the reason that the leases were presented merely as parts of a general plan of monopoly. They in turn rely upon *United States v. Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; but to show that the petition cannot be sustained under the first section of the Anti-Trust Act, and insist also that the question whether the leases are contracts in restraint of trade cannot be determined because the lessees have not been joined as parties, and are not before the court.

They further insist that the subject-matter of the leases is substantially different from the subject-matter of the petition, and requires that the defendants be given an opportunity to introduce specific evidence as to the different patents and different machines.

The defendants during the trial have waived no rights in respect to these contentions.

In view of the fact that my conclusions upon the merits of the lease question are favorable to the defendants, I pass these objections without a decision upon their validity.

In view of the full discussion of the other portions of the case by my associates, I need only state my general concurrence in their conclusions, and that I concur in all respects in the opinion of Judge Dodge upon the lease question, as well as upon all other questions in the case.

UNITED STATES *v.* UNITED SHOE MACHINERY
CO. ET AL.*

(District Court, E. D. Missouri, E. D. November 9, 1915.)

[227 Fed. Rep. 507.]

MONOPOLIES 12—CLAYTON ANTI-TRUST ACT—MONOPOLISTIC LEASES.—

Leases, by the maker of a very large percentage of all the shoe machinery made in the United States, of machines to shoe manufacturers, consisting of principal and auxiliary machines, the use

* For later opinion (234 Fed. 127) see *post*, page 791. See also (195 Fed. 578), *ante*, page 170; (222 Fed. 349) *ante*, page 686; (227 U. S. 202) *ante*, page 198.

Opinion of the Court.

[3] In the opinion of the court instruments of writing need not be set out in extenso in the pleadings, unless the bill shows that it is essential to a proper construction of the particular clauses complained of. Such is not the case here.

[4] *Is the petition defective for failing to make the lessees defendants?*

The leading authority upon which the defense relies to sustain this ground of their motion is *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499. But the facts in that case differ so materially from those set out in the plaintiff's bill that it is wholly inapplicable to the instant case. In that case the State of Minnesota brought suit to enjoin the Northern Securities Company from exercising any control in the management or operation of two separate railways, existing under the laws of the State of Minnesota, which it was charged it attempted to do by reason of the ownership and control of the majority of the stock of the two railways and numerous other roads controlled by these railways, by virtue of stock ownership, and in violation of the laws of the State of Minnesota. Mr. Justice Shiras, delivering the opinion of the court, stated the object of the bill to be:

"The narrative of the bill unquestionably disclosed that the parties to be affected by the decision of the controversy are, directly, the State of Minnesota, the Great Northern Railway Company, the Northern Pacific Railway Company, corporations of that State, and the Northern Securities Company, a corporation of the State of New Jersey, and, indirectly, the stockholders and bondholders of these corporations, and the numerous railway companies whose lines are alleged to be owned, managed, and controlled by the Great Northern [189] and Northern Pacific Railway Companies. * * * But it is not alleged that the stockholders of the Northern Securities Company constitute or are composed of all the stockholders of the two railroad companies, and, in fact, the contrary is conceded in the allegations of the bill that a majority only of the stock of one, or perhaps both, of the two railroad companies is owned, or at least controlled and managed, by the Northern Securities Company."

Some of the relief prayed in the bill was that the Northern Securities Company and its officers be enjoined "from in any way aiding, advising, directing, interfering with, or in any way taking part, directly or indirectly, in any man-

Opinion of the Court.

in relation to the position of the commission toward witnesses there attending or to attend with respect to the affairs of the New Haven Railroad. The commission, however, is not before the court by its counsel to support the position which it assumed when the proceedings involved were had, and until I have had an opportunity to hear counsel for the commission I shall harmonize my views with the presumption that the commission had the power to carry on the hearing as one related to the regulation of commerce between the States, over which [435] the commission had general jurisdiction, and I shall hold that the commission kept within its power in examining this defendant, and that in its investigation it did not go outside of the limits of its authority.

[2] Upon the second ground Judge Grubb decided positively that, by the act of Congress conferring immunity in certain cases (act Feb. 11, 1893), testimony which had been unavailable under the privilege of silence was made available. The learned judge reasoned that testimony was unavailable under the amendment where the witness showed to the tribunal calling for the testimony that giving it might reasonably tend to incriminate him, and that, inasmuch as such testimony could not be compelled because of the constitutional amendment, Congress was impelled to act, and that the act of Congress referred to could only have been intended to cover testimony which the Government was unable to obtain because of a witness declining to answer based upon the incriminating tendency of the testimony and under the protection of the fifth amendment. He ruled that no purpose existed in the mind of Congress to bestow immunity in cases where doing so was not necessary to obtain testimony which could otherwise be refused, and his conclusion was that the Immunity act was intended only to make available testimony compulsorily given and only to reward the unwilling giver of such evidence, but that evidence given without the assertion of the constitutional privilege, or declined to be given upon any ground other than because of its incriminating tendency, is not compulsory testimony under the fifth amendment and has always been available. Therefore, he reasoned, necessity for conferring immunity on the giver of such tes-

Opinion of the Court.

Morgan J. O'Brien, of New York City, for defendants Cuyler, Milligan, and Maxwell.

L. C. Krauthoff, of New York City, for defendant Vail.

HUNT, Circuit Judge.

The several applications made by the defendants Baker, Milligan, Maxwell, Cuyler, and Vail for a severance are granted. None of the five moving defendants was a director of the New Haven Company prior to May 22, 1908. Defendant Baker was elected a director on February 11, 1910. Defendant Cuyler was elected on October 26, 1910, and defendants Vail, Maxwell, and Milligan on May 18, 1911.

It appears that upon May 22, 1908, the Attorney General of the United States filed a bill in the United States Circuit Court in Massachusetts against the New Haven Company and others, charging violations of the Anti-Trust Law of the United States, and that on June 26, 1909, by direction of the Attorney General, the above referred to suit was discontinued. On June 25, 1909, the Senate of the United [585] States passed a resolution, and on the same day the Attorney General made a reply thereto. Copies of such resolution and the reply thereto are referred to by counsel who have presented these motions. The substance of the resolution of the Senate was a direction that the Attorney General inform the Senate whether the legal proceedings against the New York, New Haven & Hartford Railroad Company and the Boston & Maine Railroad Company for violation of the Anti-Trust Law had been dismissed, and, if any statement had been given out by the Attorney General, that he attach a copy of such statement to his reply to the resolution, and to inform the Senate when such proceedings were begun and instituted. The Attorney General, under date of June 25, 1909, replied that he had directed the United States attorney for the district of Massachusetts to dismiss the legal proceeding brought by the United States against the New York, New Haven & Hartford Railroad Company and the Boston & Maine Railroad Company for violation of the Anti-Trust Law, and that he

Opinion of the Court.

Henry J. Brodsky, of San Francisco, Cal., and *Loeb & Loeb*, of Los Angeles, Cal., for plaintiff.

Hiatt & Selby, of Los Angeles, Cal., for defendant.

WELLBORN, District Judge.

I am of opinion that the restrictions here sought to be enforced are invalid, both at common law and under act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). The case made by the bill falls within *Dr. Miles Medical* [384] *Co. v. Park & Sons Co.*, 220 U. S. 373, 408, 31 Sup. Ct. 376, 385 (55 L. Ed. 502), wherein the court declares broadly, underscoring mine:

"The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. * * * And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. *The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.*"

The recent case of *Bauer & Cie v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, decided May 26, 1913, which is the latest one called to my attention, construes the former case thus:

"The question, therefore, now before this court for judicial determination is: May a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber, who has paid to the agent of the patentee the full price asked for the article sold? The object of the notice is said to be to effectually maintain prices and to prevent ruinous competition by the cutting of prices in sales of the patented article. That such purpose could not be accomplished by agreements concerning articles not protected by the patent monopoly was settled by this court in the case of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 [31 Sup. Ct. 376, 55 L. Ed. 502], in which it was held that an attempt to thus fix the price of an article of general use would be against public policy and void."

Since both of these decisions are by the Supreme Court of the United States, and, of course, authoritative here, it is

Opinion of the Court.

It is clear that the jobbers in the instant case were not merely the agents, but were the vendees, of the manufacturer: and the case as to the jobbers is therefore not within decisions, such as *Virtue v. Creamery Package Co.*, 277 U. S. 37, 33 Sup. Ct. 202, 57 L. Ed. 393, which holds that the contract by which the manufacturers of a patented article appoints another, who does not manufacture or sell like articles, his exclusive agent for the output of the factory, does not violate the Sherman Act; nor within cases like *Locker v. American Tobacco Co.* (C. C. A. 2), 218 Fed. 447, 134 C. C. A. 247, which holds that an agreement whereby a manufacturer made a certain jobber its sole agent in certain territory, on condition that it should not sell the manufacturer's product at more than list prices, did not violate the Federal Anti-Trust Law. Nor do the facts present a case for the application of the rule (illustrated by *Paper Bag Patent case*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, and *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689), that defendants are not required to sell to anyone they do not wish.

It is also clear, in our opinion, that the sales by defendants in the instant case were not conditional, as held to be the case in *Henry v. Dick*, but absolute, within the rule in *Bauer v. O'Donnell*. Nor are they brought within *Bement v. National Harrow Co.*, *supra*. Whether the value of the carton is negligible as compared with the value of the contents of the package, and its purchase a mere incident in the contract of sale, or whether, as urged by defendants, the carton has itself a substantial value, is not controlling of the ultimate merits; for its use can surely give no greater right than if it were the only article sold, as [730] in the *Sana-togen case*, nor was it sold for use with subsequent purchases of the food. Defendants were thus given by the patent no warrant to impose upon either jobbers or retailers restrictions limiting the resale price of the product after an absolute sale had once been had by defendants.

We find in *United States v. Keystone Watch Case Co.* (D. C.) 218 Fed. 502 (recently decided by the Circuit Judges of the Third Circuit), nothing conflicting with this view as respects restrictions upon jobbers; for we assume, as we

Syllabus.

GREAT ATLANTIC & PACIFIC TEA CO v. CREAM OF WHEAT CO.*

(District Court, S. D. New York. July 20, 1915.)

[224 Fed. Rep., 566.]

MONOPOLIES 17—"RESTRAINT OF TRADE"—INJUNCTION.—The refusal of the manufacturer of an unpatented food product, which is not a necessity of life or even a staple article of trade, who has a monopoly only because of the trade-name under which it is sold, it being open to anyone else to make and sell the same article under any other name which does not infringe such trade-name, to sell to a dealer who resells at retail at less than the regular price charged by other retailers, and a price which gives to the retailer no profit; while to an extent it lessens competition, is not an unreasonable "restraint of trade," nor is it unlawful under the Clayton Act (act Oct. 15, 1914, c. 323, § 2, 38 Stat. 730) as a price discrimination, the effect of which "may be to substantially lessen competition or tend to create a monopoly," so as to entitle the would-be purchaser to relief by injunction under section 16 of the act; but, on the contrary, the effect of such an injunction would be to restrain trade by making it impossible for competitors to handle the article, except at a loss, and to give such purchaser a monopoly.^b

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

For other definitions, see Words and Phrases, First and Second Series, Restraint of Trade.]

[567] **MONOPOLIES 17—INTERSTATE-COMMERCE LAW—CONSTRUCTION OF CLAYTON ACT.**—Construing together the provisions of section 2 of the Clayton Act the last proviso in effect authorizes persons engaged in selling goods in interstate commerce to select their own bona fide customers, provided the effect of such selection is not to substantially and unreasonably restrain trade; and the refusal of a manufacturer to sell its product to a dealer, who avowedly uses it in a manner which injures and lessens the trade of the maker, cannot be said to be an unreasonable restraint of trade, nor a violation of the statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

* For opinion of Circuit Court of Appeals (227 Fed., 46), see post, page 873.

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Opinion of the Court.

to fill plaintiff's orders for Cream of Wheat in carload lots at \$3.95 per case. Of course the bill does not put the matter so badly,^a but if the law does not warrant an order productive of the result stated this action is of little worth.

It is not worth while to consider whether the facts above shown produce a case under the Sherman Act (act July 2, 1890, c. 647, 26 Stat. 209). If they do, the matter is not much advanced, because under that statute the plaintiff could not bring this action in equity; and, if [571] they do not, plaintiff just as firmly asserts its right to relief under the Clayton Act (act Oct. 15, 1914, c. 323, 38 Stat. 730). I shall therefore follow counsel (none of whom has discussed the applicability of the Sherman Act) and say no more about it.

[1] It is urged that defendant's professed and published scheme of sales, plus its practice thereunder, create an actual monopoly of, and do lessen competition in, Cream of Wheat; that this result is in itself unlawful, and is produced by means which are specifically prohibited by section 2 of the Clayton Act, viz, price discriminations not justified by any of the exceptions of that section. As the next and final step in justification of its procedure, plaintiff asserts itself to be threatened with loss or damage through the above-stated violations of section 2, and therefore seeks an injunction under

^a The prayers of the bill are as follows:

"1. That it be adjudged that the said plan or system of sales and said system of embargo are illegal, and that the defendant herein has violated sections 1 and 2 of the act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' [Comp. St. 1913, §§ 8820, 8821], and section 2 of the act of Congress of October 15, 1914, entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.'

"2. That defendant be enjoined and prohibited from enforcing and carrying out *said plan or system of sales*, or from enforcing or attempting to enforce said embargo by means of said boycotting, black-listing, or otherwise, *and from thereby* in any manner or to any extent *cutting off the plaintiff's supply of said article 'Cream of Wheat'* within the jurisdiction of the United States until such time as your honors shall appoint and direct and order herein, and that upon such hearing the writ herein prayed for be made and confirmed until the final determination of this suit, and that thereupon said injunction may be made perpetual."

Opinion of the Court.

deemed applicable to the case in hand, thus: It is unlawful for a person engaged in commerce,^a and in the course of commerce, to discriminate in price between purchasers of [572] commodities,^b whenever discrimination may substantially lessen competition, or tend to create a monopoly in any line of commerce;^c but there may be price discrimination on account of quantity of commodity sold, and persons selling goods may still select their own customers in bona fide transactions,^d and not in restraint of trade.

Plaintiff's syllogisms in support of the demand for relief are simple, thus: (1) Defendant has a monopoly in Cream of Wheat; (2) through such monopoly it fixes the resale price of that article; therefore (3) it prevents competition in Cream of Wheat and violates the body of section 2. Again: (1) Preventing competition is restraint of trade; (2) defendant does prevent competition; therefore (3) it restrains trade and is not within the exception of section 2. If the premises of the above logical formulæ are admitted in the sense and to the extent plaintiff asserts or assumes as proper, the conclusions flow as matter of course. A successful answer must deny or avoid the premises, or ascribe to words a scope and meaning at variance with plaintiff's usage.

Taking up seriatim the parts of the above propositions: It is true that defendant has a monopoly in Cream of Wheat; but, as heretofore stated, it is a lawful monopoly, ultimately resting on the plain truth that there can be nothing anywhere in the United States lawfully called Cream of Wheat without defendant's consent and approbation. In that substance (if legally it is a distinct substance)

^a Commerce can only mean (as the context shows) interstate or foreign commerce.

^b That is, "commodities" sold by the "person" first named.

^c "Line of commerce." This vulgarism is not a term of art, but it must mean trading or dealing in the commodities (or some of them) first above spoken of.

^d It would have been simpler to say that vendors may select their own bona fide customers. I think the intent is to exclude from the exception pretended sales, e. g., consignments to undisclosed agents, and perhaps sales coupled with an attempted condition subsequent.

Opinion of the Court.

suade them to buy other things at a compensating profit. That competition, as encouraged by statutes and decisions, does not include such practices, has been sufficiently shown (with ample citations) in *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522.

It is further obvious that, when plaintiff premises that preventing competition is restraining trade, it is assumed that the resultant restraint is *unreasonable*; for there is nothing in the Clayton Act to compel or induce courts to hold that the trade restraint referred to by this statute differs in kind, quality, or degree from that now held to be meant by the Sherman Act.

Because, therefore, I am not persuaded that the acts of defendant have produced, or tend to produce, diminution of any competition favored by reason or law, or have restrained trade unreasonably (if at all) I do not find it necessary to accede to the second syllogism.

Mere doubt of the propositions of plaintiff would require refusal of preliminary injunction; but I may more distinctly state my reasons for thinking that even definite, positive, and admitted price regulation is not unreasonable restraint of trade in the present instance.*

Cream of Wheat is not a necessity; it is not even a staple article of commerce. If it be a commodity at all, the commodity and the name are synonymous. Its continued ex-

* There is surely a very obvious difference between enforcing by legal process an agreement to regulate prices and regulating prices by legal process. The agreement may be, and usually is, unenforceable. *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, gives the reasons. But it is not necessarily unlawful for a man to do voluntarily what he cannot be compelled to do. It follows, therefore, that even under the Clayton Act price regulation accomplished without undue or unreasonable trade restraint, and by a judicious selection of customers, may be lawful. It seems to be argued for plaintiff that, because defendant could not enforce a price agreement, it cannot by any method accomplish, even partially, the same result. It is an amusing commentary on this doctrine that the main object of this suit is to have this court *compel* delivery of Cream of Wheat at \$3.95 per case, which is pro tanto price fixing.

Opinion of the Court.

istence depends upon defendant's ability to control the marketing of its own product. The doing of what plaintiff wishes would take from every groceryman near an "Economy Store" the last incentive to buy any Cream of Wheat, and collectively such grocery keepers are more important to the public and the defendant than is the plaintiff. If injunction were granted, [574] defendant and many retailers would be injured, and the microscopic benefit to a small portion of the public would last only until plaintiff was relieved from the competition of the 14-cent grocers, when it, too, would charge what the business would normally and naturally bear. In short, it is plaintiff, and not defendant, that pursues methods whose hardship and injustice have often been judicially commented upon. *U. S. v. Freight Assn.*, 166 U. S. 321, 17 Sup. Ct. 540, 41 L. Ed. 1007.

In my judgment the prevention or limitation of practices such as plaintiff's (so far as consistent with statute law) is the reverse of unreasonable.

There remain two legal inquiries (previously suggested) to which this motion justifies answers, which answers go to the root of plaintiff's case. The questions are: (1) Does section 2 of the Clayton Act apply to the defendant at all? and (2) Is it within the power of Congress to compel defendant to do what plaintiff demands?

[2] Section 2 plainly identifies the lessening of competition with restraint of trade. (Cf. the body of the section with the last exception.) But price discrimination is only forbidden when it "substantially" lessens competition. Construing the whole section together, the last exception reads in effect that a "vendor may select his own bona fide customers providing the effect of such selection is not to *substantially* and *unreasonably* restrain trade." How it can be called substantial and unreasonable restraint of trade to refuse to deal with a man who avowedly is to use his dealing to injure the vendor, when said vendor makes and sells only such an advertisement-begotten article as Cream of Wheat, whose fancy name needs the nursing of carefully handled sales to maintain an output of trifling moment in the food market, is beyond my comprehension.

Statement of the Case.

contract not to engage in competing business for terms of from 5 to 20 years. It also by contract with the makers obtained entire control in the United States of the imported raw paper which was recognized as the only standard paper for the manufacture of photographic printing-out paper, and by refusing to sell to other manufacturers compelled several competing companies to sell or go out of business. It acquired stock houses in the larger cities, which handled chiefly its own products, and by contracts with other dealers to [68] whom it sold fixed resale prices and required them to sell its goods exclusively. By such means it secured control of from 75 to 80 per cent of the entire interstate trade in the articles in which it dealt. *Held*, that such methods were intended and calculated to, and did, result in an undue and unreasonable restraint of interstate trade, and in securing to the Eastman Kodak Company a "monopoly" of a part thereof, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647 §§ 1, 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821).^a

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10, Dec. Dig. 12.]

For other definitions, see Words and Phrases, First and Second Series, Monopoly.]

MONOPOLIES, 12—ACTS IN RESTRAINT OF TRADE—ARBITRARY USE OF POWER RESULTING FROM LARGE BUSINESS.—While the size of a corporation and the extent of its business do not alone constitute an illegal monopoly, they may properly be considered when its acquisitions of property are accomplished by methods showing an intention to monopolize and restrain interstate trade, and by an arbitrary use of power resulting from a large business to eliminate weaker competitors.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

In Equity. Suit by the United States against the Eastman Kodak Company, a corporation of New Jersey, the Eastman Kodak Company, a corporation of New York, George Eastman, Henry A. Strong, Walter S. Hubbell, and Frank S. Noble. On final hearing. Decree for complainant.

John Lord O'Brian, U. S. Atty., of Buffalo, N. Y., and *Mark Hyman*, Sp. Asst. Atty. Gen., for the United States.

Philipp, Sawyer, Rice & Kennedy, of New York City (*James J. Kennedy* and *William S. Gregg*, both of New York City, and *S. Wallace Dempsey*, of Lockport, N. Y., of counsel), for defendants.

^a Syllabus copyrighted, 1915, 1916, by West Publishing Company.

Opinion of the Court.

a pocket Kodak in which the film rolls were arranged in front of the focal lens—a departure from the earlier A. B. C. camera manufactured by the Eastman Company, in which the film rolls were arranged in the rear of the focal plane, a feature also described in the Houston patents, No. 526,445 and No. 526,446, dated September 25, 1894, which were later acquired by the Eastman Kodak Company. A camera called the Bullett, also having the film roll in front of the focal plane, was marketed by the Eastman Company in the year 1895, and was followed by a folding pocket Kodak and a Brownie camera, in which classes of film-roll cameras the said company claims to have been the pioneer.

Whether the defendant Eastman or the companies organized by him are entitled to be accredited with being the first to simplify the use of the film roll camera is questioned; the Government claiming that the invention of the dry plates was in fact the beginning of amateur photography, that impetus was afterwards given thereto by the introduction of various small hand plate cameras, and that later, about the year 1894, the Bullseye camera marketed by Blair & Turner revolutionized film photography. Evidence was given to show that from 1892 to 1894 sales of the Kodak, introduced by the Eastman Company in 1888, were steadily decreasing; it being pointed out that in 1892 the sales of Kodaks and apparatus amounted to \$207,212.51, and in 1894 to \$74,594.33, while the sale of films amounted to \$102,404.29 in 1892 and to \$81,319.48 in 1894, which decrease the Government attributed to the competition created by the appearance in the market of the Bullseye camera. It is shown that suits for infringement of the Walker & Eastman roll holder patents were instituted against Blair & Turner, and a preliminary injunction obtained, which was afterwards vacated; but that improvements in the camera were made by Turner, Houston, and others does not in my opinion change the fact that Walker and Eastman first solved the problem of the film roll camera by producing the roll holder to which reference has hereinbefore been made.

However that may be, in the years 1895, 1898, and 1899, the Eastman Kodak Company acquired the business of the Boston Camera Manufacturing Company, the American

Opinion of the Court.

In 1899 the Blair Camera Company, also organized by Mr. Blair a number of years previously, was acquired by the Eastman Kodak Company. At this time, however, Blair was not connected with the company, the principal owner being one Goff, who solicited Mr. Eastman to buy the business. At the time of the sale the Blair Camera Company was making the Hawkeye film camera, the base for its film being supplied by the Celluloid Company, and was the owner of the Crane patents No. 549,231 and No. 549,232 for improved roll holders employing black paper at each end of a perforated film. Mr. Eastman gave as a reason for acquiring the Blair Camera Company that he wished to acquire the Crane patents, as he believed it might be possible to develop by their adaptation a better method for exposing film, and also that prior to such purchase the Blair Camera Company was infringing the Houston patents. However, whatever the reason may have been, the purchase was not illegal; and in the absence of any unfair practices in the acquisition of such property I am disinclined to hold that there was anything wrongful in such transaction, or in any of the transactions by which the three specified companies were acquired. Up to this time the evidence fails to show anything unlawful in the operations of the Eastman Kodak Company; but it did not stop there, and it can scarcely be doubted that such acquisitions were the nucleus from which arose the intention to bring other companies manufacturing and dealing in photographic supplies under its control. Its commodities were extensively advertised and its business [71] grew rapidly, necessitating numerous additions to its manufacturing plants at Rochester at different times, beginning in 1890. Improvements were constantly being made in cameras, and the increasing simplicity with which they were operated rapidly increased the number of amateur photographers.

Modern photography is not dependent alone upon the camera for its success, but also upon the character of the raw paper used for what is technically known as printing-out paper. To produce good results the raw stock must be free from metallic substances, for metal has an injurious effect on the silver coating put upon the paper. It was generally

Opinion of the Court.

Palmer, successor to Palmer & Coughton, Rochester, N. Y., are at present the only authorized coaters of Steinbach and Rives raw stock for gelatine printing-out process."

Terms of sale binding upon all dealers in photographic papers were thereupon put into effect. Discounts on raw paper were reduced from 25 per cent to 15 per cent, but an additional discount of 12 per cent was allowed to dealers who manifested by certificate that they had complied with the Eastman restrictions, which required the dealer to sell no other gelatine printing-out paper than that sold him by the Eastman Company. The New Jersey Aristotype Company and the American Aristotype Company, which has been acquired by the Eastman Company, required similar certification as a condition of the payments of discounts.

It was also shown that arrangements were made between the American Photographic Paper Company and the General Paper Company, whereby Mr. Curtis, who was connected with the former company, agreed not to manufacture, deal, or experiment in photographic paper, except with the consent of the General Paper Company, in consideration for which the latter agreed to buy 100,000 pounds of paper a year and pay the former an annual indemnity of \$8,500. Thus the American manufacturers of photographic paper became subservient to the General Paper Company of Brussels, and the Eastman Kodak Company accomplished its purpose of controlling in this country the raw-paper stock industry, both foreign and domestic.

The contract in question was renewed on December 20, 1906, for a term of nine years, without, however, including the baryta coaters, and continued in force until June 30, 1910, when it was canceled by mutual consent; such cancellation no doubt being due to the acquirement of the Artura Company by the Eastman Company (Government Exhibit 387) and the disinclination of the General Paper Company to bear further losses due to putting fighting brands of paper on the market (Government Exhibit 382). As a result of such contracts many competitors of the Eastman Company were interfered with in their business and some were driven from the market. By their inability to obtain

Opinion of the Court.

The corporation was dissolved in 1911. The Stanley Dry Plate Company, of Newton, Mass., was acquired in January, 1894, also under restrictive covenants on its officers not to engage in the manufacture of dry plates. This company was legally dissolved in 1905.

From 1902 to the date of the filing of the bill, the Eastman Kodak Company acquired the following stock houses, which were scattered through the United States and were engaged in selling photographic supplies: Sweet, Wallach & Co., Chicago, Ill.; O. H. Peck Company, Minneapolis, Minn.; Zimmerman Bros., St. Paul, Minn.; John H. Fouchs Company, Minneapolis, Minn.; Kortwright & Kline Company, Sioux City, Iowa; Milwaukee Photo Materials Company, Milwaukee, Wis.; Robey-French Company, Boston, Mass.; Robert Dempster Company, Omaha, Nebr.; Albert Sellner Company, Quincy, Ill.; Good & Schroeder, Chicago, Ill.; John Haworth Company, Philadelphia, Pa.; Northwestern Photo Supply Company, Seattle, Wash.; Glenn Photo Stock Company, Atlanta, Ga.; Standard Photo Supply Company, New Orleans, La.; Denver Photo Materials Company, Denver, Colo.; Howland & Dewey Company, Los Angeles, Cal. In 1903 the Eastman Kodak Company acquired the Century Camera Company and the Rochester Optical & Camera Company, plate camera concerns engaged in business at Rochester, N. Y., and in 1905 the Folmer & Schwing Manufacturing Company, a plate camera concern of New York.

It is difficult to avoid the conclusion that the acquisition of the various companies was for the purpose of suppressing competition and in furtherance of an intention to form an illegal monopoly. Especially is this true when it is observed that in nearly every instance the conveyances contained restrictive covenants prohibiting the officers of the acquired concerns from re-entering the business for periods ranging from 5 to 20 years, thus serving, as said in the Tobacco case, "as perpetual barriers to the entry of others" into the trade in question. As opposed to this view, the defendants contend, among other things, that the stock houses after purchase did not discontinue the sale of competing articles, and that out of 146 stock houses in the

Opinion of the Court.

fair inducements to [78] handle their goods exclusively; that such an arrangement is to the interests of both; and that the Eastman Kodak Company was the first to induce stationers, druggists, and others to handle photographic goods as a side line. All this and more, it may be conceded, separated from other acts, might furnish no ground for holding that there was an illegal monopoly; but the arbitrary enforcement of the restrictive conditions by the establishment of a system of espionage, and the keeping of records of violations of such conditions, with a view of penalizing such dealers, are evidences of an intention to promote a monopoly. In this connection the language of the court in *State v. International Harvester Co.*, 237 Mo. 369, 141 S. W. 672, and quoted in *United States v. International Harvester Co.* (D. C.), 214 Fed. 987, may be fittingly applied. There the court said:

"In the case at bar we are to take the acts of the parties and judge their purpose by the consequence that would naturally result. When men deliberately and intelligently go to work and acquire power that will enable them to control the market, if they choose to exercise it, there is no use for them to say that they did not intend to control the trade or limit competition; nor, when the legality of their act of acquisition is in question, is it any use for them to say, 'We have not used the power to oppress anyone.'"

It is asserted that the right of a patentee to restrict the sales price of a patented article by agreement with the retail dealer has not been broadly decided; but it has been decided that patent rights and sales price restrictions for a patented article cannot be used as a shield to nullify the Sherman Act. As said by the Supreme Court in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 83 Sup. Ct. 9, 57 L. Ed. 107:

"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions."

It will be observed that the bill of complaint makes no mention of cinematograph film for moving pictures, but testimony in relation thereto was received over the objection of counsel. It was believed at the hearing that the term "film," as used in the bill, was sufficiently comprehensive to include

Opinion of the Court.

measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

These remedies are thought applicable to the present situation. Although counsel for defendants concede that the court has power to dissolve an illegal combination of competing units, they nevertheless argue that no dissolution should be decreed herein, as the acquired property consisted of non-competing units; but, as hereinbefore indicated, I do not agree with this contention. It makes no difference that some or all of the acquired concerns differently constructed some of their products, inasmuch as they were all engaged in the same business; that is, manufacturing or dealing in photographic supplies. The record (Appendix L) shows that the total sales by defendants in 1912 of self-developed products amounted to \$14,082,696.55, and of acquired products to \$3,800,716.53, from which it would seem that no irremediable hardship would result from a separation of the present business into two or more independent companies. However, it is not at this time intended to indicate either a dissolution, division, or reorganization of the business of the defendants. It no doubt is possible that an adequate measure of relief might result from enjoining the unfair practices of the terms of sale agreements, and from a separation of the business; but the defendants should have an opportunity to present to the court on the first day of the 1915 November term a plan for the abrogation of the illegal monopoly which unduly and unreasonably restrains interstate trade and commerce.

In the meantime jurisdiction is retained by this court to make such other orders and decrees as may be deemed necessary to the granting of the relief demanded in the bill, or such other relief as the equities of the case may require, with costs.

Opinion of the Court.

involved. In any event the mere removal of incidental evils and practices would tend to legalize the monopoly.

A re-examination of *United States v. St. Louis Terminal Co.*, 224 U. S., 383, 32 Sup. Ct., 507, 56 L. Ed., 810, *United States v. Great Lakes Towing Co.* (D. C.), 208 Fed., 738, and the *Keystone Watch Case* (D. C.), 218 Fed. 502, satisfies me that they do not point out the nature of the decree that should be entered in this case. At first I was inclined to think they did, but I am now convinced to the contrary. The larger portion of the business of the Towing Company related to towing vessels into local harbors. The towing tugs were not engaged in interstate commerce, and it can scarcely be held that there was competition between such tugs and tugs in other ports. It was not unlike the *St. Louis Terminal* case, wherein the Supreme Court permitted the elimination of illegal practices which were in the nature of administrative conditions; the illegal combinations, consisting of terminal facilities, not being otherwise engaged in restraining interstate trade.

[2] 2. The doctrine of laches is inapplicable herein, as some of the acts in furtherance of the illegal monopoly were committed just before the filing of the bill, and in addition to this the defendants were apprised before the beginning of the suit that their methods of doing business were deemed by the Government violations of the Anti-Trust act (act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1913, §§ 8820-8830]).

[3] 3. The final decree submitted by the Government is thought satisfactory, but I shall withhold my signature for a few days to give the defendants an opportunity to make known any objections they may have to the form thereof. This proposed decree will enable the defendants to take an appeal to the Supreme Court and have the important questions herein involved determined once and for all. In the meantime an interlocutory decree may be entered, the terms of which may be settled on application for a supersedeas.

4. There is no necessity at this time for referring the matter to the Federal Trade Commission, as such procedure may be resorted to after a decision has been rendered on the appeal by the Supreme Court.

Syllabus.

and into such number of parts of separate and distinct ownership as may be necessary to establish competitive [525] conditions and bring about a new condition in harmony with law; and the defendants shall file with the clerk within 90 days from the entry of this decree a plan for such separation and division for the consideration of this court. In the event this case is appealed and the decree superseded within 60 days from the entry thereof, the time within which the defendants shall file said plan is hereby extended to 60 days from the filing of the mandate of the Supreme Court with the clerk of this court. Jurisdiction is retained by the court to make such additional orders or decrees as may be necessary to carry this decree into effect.

"(4) Inasmuch as trade in cinematograph film and foreign trade in photographic supplies are not covered by the petition herein of the United States of America, no decree in regard to such subjects is made herein, but without renouncing the power and duty of this court to deal with all the property and business of every character of the corporate defendants in effecting the abrogation of the monopoly herein adjudged illegal.

"(5) Nothing in this decree contained shall prevent the defendants, or any of them, from the institution, prosecution, or defense of any suit, action, or proceeding involving any of their property or rights.

"(6) The petitioner shall recover from the defendants the costs of this suit, to be duly taxed herein.

"(7) The injunction granted by the second sub-division of this decree shall take effect 60 days after the entry of this decree, in case no appeal is taken from it. If an appeal be taken, and the decree be superseded, its operations shall be suspended until such time as shall be fixed in the final decree of this court entered on the mandate of the Supreme Court."

UNION PAC. R. CO. ET AL. v. FRANK ET AL.

FRANK ET AL. v. UNION PAC. R. CO. ET AL.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1915.)

[226 Fed. Rep., 906.]

MONOPOLIES 24—ANTI-TRUST ACT—SUITS FOR VIOLATION—WHO MAY MAINTAIN.—A private individual may not maintain an action to enforce generally the provisions of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209; but, in order to rely upon its provisions, an individual must base his cause of action upon its violation,

Statement of the Case.

and show a special damage to himself arising from such violation, not suffered by the general public.*

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 17; Dec. Dig. 24.]

CORPORATIONS 182—STOCK CONTROL BY ANOTHER CORPORATION—RIGHTS OF MINORITY STOCKHOLDERS.—A railroad company, which through stock ownership controls another company, owning and operating a connecting line, cannot be charged with a breach of duty toward minority stockholders because of expenditures made in reconstructing and improving the line of the controlled company, although such expenditures inured to its own benefit, where they were made by the directors of the controlled company in good faith, and proved, as expected, of large benefit to that company as well, by reason of largely increased traffic through the connection, to obtain which they were necessary.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 686-690; Dec. Dig. 182.]

Rights of minority stockholders as to management of corporate affairs, see note to *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 89 C. C. A. 482.

CORPORATIONS 184—STOCK CONTROL BY ANOTHER CORPORATION—RIGHTS OF MINORITY STOCKHOLDERS.—A railroad company, which through stock ownership controls another company, stands in a fiduciary relationship to the minority stockholders, and cannot lawfully sell to the controlled company a line of road built and owned by itself, the chief purpose of which is to benefit its own business, and not that of the controlled company.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 692; Dec. Dig. 184.]

CORPORATIONS 156—STOCKHOLDERS—RIGHT TO DIVIDENDS.—The mere fact that a railroad company has earned net profits in a designated year does not entitle preferred stockholders to dividends therefrom, regardless of the needs of the company in the way of maintenance and betterments, to enable it to properly perform its duty to the public.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 581-588, 598-603; Dec. Dig. 156.]

Appeal from the District Court of the United States for the District of Nebraska; W. H. Munger and Thomas C. Munger, judges.

Suit in equity by Charles A. Frank and others against the Union Pacific Railroad Company and others. Decree for complainants, and both parties appeal. Reversed.

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Opinion of the Court.

St. Joe, and the control of the property, affairs, and business of the latter, which had been and was being exercised by the Union Pacific by virtue of such stock ownership, were in violation of the inhibitions of the Sherman Act. It was further adjudged that the Union Pacific and the St. Joe be permanently and perpetually enjoined and restrained, the said Union Pacific from directly or indirectly voting or attempting to vote any shares of the stock owned, held, or controlled by it in the St. Joe, at any meeting of the stockholders of the St. Joe, and the St. Joe from permitting or suffering such shares of stock so voted, held, or controlled by the Union Pacific to be voted at any such meeting; that the Union Pacific be enjoined and restrained from exercising or attempting to exercise any control, direction, or supervision whatsoever over the acts or doings of the St. Joe by virtue of its ownership or control of any of the shares of stock of the St. Joe; that the said St. Joe be enjoined and restrained from permitting or suffering the Union Pacific to exercise any control, direction, or supervision whatsoever over the corporate acts of the St. Joe; that the said St. Joe be enjoined and restrained from paying any dividends to the said Union Pacific on account of shares of stock of the St. Joe owned, held, or controlled by said Union Pacific until the further order of [908] the court; that said Union Pacific be enjoined and restrained from collecting or receiving any such dividends on such shares of stock; that the St. Joe be permanently and perpetually enjoined and restrained from using any of its funds, moneys, property, credit, or earnings for the benefit, or in the interest, or to further the purposes or business of the Union Pacific, or otherwise than for the management, maintenance, and equipment of the St. Joe as an entirety, and solely for the need of its legitimate business, and from making any further expenditures for the reconstruction of that portion of the line of said St. Joe, lying between Upland, Kans., and Hastings, Nebr., and from purchasing, acquiring, or leasing the railroad of the Hastings & Northwestern Company, or any part thereof, which extends from the tracks of the St. Joe at Hastings, Nebr., to the tracks of the Union Pacific, at or near Gibbon, Nebr.,

Opinion of the Court.

except existing terminal and depot arrangements at Hastings, which were permitted to continue until the further order of the court, until a board of directors, chosen by the stockholders, other than the Union Pacific, should authorize such expenditures heretofore mentioned in the decree. It was further adjudged that unless, within 60 days after the entry of the decree, the management and control of the St. Joe should be surrendered to a board of directors chosen by holders of stock of said company, other than stock held or owned directly or indirectly by the Union Pacific, that a receiver of said St. Joe and of all its property and franchises should be appointed by the court, with the usual powers and duties of receivers in such cases.

[1] The far-reaching scope and extent of this decree suggests at once a careful examination of the law and the facts upon which it is based. The Union Pacific and St. Joe appealed generally. The complainants appealed, in so far as the court failed, omitted, and refused to hold and decree that the control by the Union Pacific of the property, business, and affairs of the St. Joe had been and was in violation of the fiduciary obligation owing by said Union Pacific as controlling stockholder of the St. Joe, and in so far as the court failed, omitted, and refused to hold and decree that the proposed reconstruction of the Upland-Hastings portion of the St. Joe, as described in the petition and shown by the proofs, and the proposed acquisition of the so-called Gibbon cut-off were ultra vires and beyond the corporate powers of the St. Joe, and in so far as the decree failed, omitted, and refused to require the Union Pacific to account for and pay over to the St. Joe all moneys, whether paid out of surplus or current earnings, expended in the reconstruction of the Upland-Hastings portion of the St. Joe, and all moneys expended by said St. Joe for the benefit of said Union Pacific and not required to be expended for the legitimate needs of the St. Joe, and all losses sustained by the St. Joe, owing to the control and management of its affairs by the Union Pacific.

The complainants are minority holders of first and second preferred stock of the St. Joe, and bring this action

Opinion of the Court.

and restrain such violations of the Anti-Trust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States, under the fourth section of the act, by district attorneys of the United States, acting under the direction of the Attorney General, thus securing the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan operative throughout the entire country. Possibly the thought of Congress was that by such a limitation upon suits in equity of a general nature to restrain violations of the act, irrespective of any direct injury sustained by particular persons or corporations, interstate and international trade and commerce, and those carrying on such trade and commerce, as well as the general business of the country, would not be needlessly disturbed by suits brought on all sides and in every direction to accomplish improper or speculative purposes."

See, also, *Pidcock v. Harrington* (C. C.) 64 Fed. 821; *Southern Indiana Express Co. v. U. S. Express Co.* (C. C.) 88 Fed. 659; *Metcalf v. American School Furniture Co.* (C. C.) 108 Fed. 909; *G., C. & S. F. R. Co. v. Miami S. S. Co.*, 86 Fed. 407, 30 C. C. A. 142; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 33 C. C. A. 517; *Bigelow v. Calumet & Hecla Mining Co.* (C. C.) 155 Fed. 869.

[910] We think whatever doubt may have existed upon the subject has been removed by the decision of the Supreme Court in the case of *D. R. Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. 520, handed down on February 23, 1915. It was there said:

"In the second place, the proposition is repugnant to the Anti-Trust act. Beyond question, re-expressing what was ancient or existing and embodying that which it was deemed wise to newly enact, the Anti-Trust act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same. *Standard Oil Co. v. United States*, 221 U. S. 1 [31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734]; *United States v. American Tobacco Co.*, 221 U. S. 106 [31 Sup. Ct. 632, 55 L. Ed. 663]. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent, not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute,

Opinion of the Court.

subject further. In the first place, because they show, in addition, how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States—a jurisdiction evidently given, as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting from such finding. In the second place, because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale, but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility, and not to leave it to individual action prompted, it may be, by purely selfish motives.”

While the case cited is not parallel to the case at bar, still the reasoning and language of the Supreme Court leaves no doubt that it is the opinion of the Supreme Court that private individuals may not maintain an action to enforce the provisions of the Sherman Act generally, but that in order to rely upon its provisions an individual must base his cause of action upon its violation, and show a special damage to himself arising from such violation, not suffered by the general public.

We are not unmindful of act of Cong. Oct. 15, 1914, c. 323, 38 Stat. 737, which in section 16 gives any person, firm, corporation, or association the right to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties against threatened loss or damage by violation of the Anti-Trust laws. Whether this law could be appealed to by complainants in the present action may be doubted, as it was not passed until after the final decree was rendered in this action, and it has no retroactive effect. Conceding, however, that it might be made applicable to this action, it does not change the rule already established by the decisions of the courts, as the right to sue by a private party is only given to obtain injunctive relief against threatened loss or damage. So that, if the law could be applied in the present action, it still remains true that loss or damage to the complainants must be shown. The conclusion thus arrived at makes it apparent that the decree below has

Syllabus.

paraphernalia and stage properties. The owners of such theaters and their booking agents entered into a combination or conspiracy in restraint of their own business, whereby the theater owners were not to employ performers not booked through booking agents, and the booking agents were not to act for any theater employing any other booking agent, or employing any performer who played outside such circuits or who had as a representative any person who had obtained employment for a performer outside such circuits. Any theater employing such a performer would be blacklisted and the booking agents would not act for it. *Held*, that the effect of a monopoly of such business upon interstate commerce was not so inconsiderable as not to come within the Sherman Act (act July 2, 1890, c. 647, 26 Stat. 209.)

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—That a State has power to tax a business is not determinative that a combination monopolizing such business is outside the Sherman Act; nor does it follow, because a combination is within the act, that the business may not be subject to a State tax.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

[166] **MONOPOLIES 12—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.**—A combination may be within the Sherman Act, though concerned in great part with internal matters.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—In an action for damages caused to plaintiff by a combination in restraint of interstate commerce, it is immaterial whether the acts in pursuance of the combination which injured plaintiff were themselves acts of interstate commerce; the illegality arising from the project or plan as a whole.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—A combination between a number of vaudeville theaters and their booking agents, the purpose of which is to keep all first-class performers for such theaters, refuse to allow them to act if they act in other theaters, and refuse to allow other theaters to have their performers if they employ other performers, and refuse to deal with performers' agents who book such performers elsewhere, is in restraint of trade, where it is alleged that, outside of the circuits into which such theaters are arranged, first-class performers can not obtain sufficient employment in the United States and Canada to make a living, as the necessary inference is that, if successful, the parties to the combination will control all first-

Opinion of the Court.

[2] The nature of the defendants' business is one thing, determinative in cases where the question arises of a State license tax or the like; the subject-matter of their combination is, at least formally, different. Perhaps the distinction has small practical consequences here, yet it is important in such shifty questions to keep the principles in mind. No doubt the proposition still stands good that the restraint of interstate commerce must be direct (*United States v. Patten*, 226 U. S. 543, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. [N. S.] 325), just as it did when *E. C. Knight v. United States*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, was decided; but nobody can intelligently read the decisions without becoming aware that the actual meaning of the words has greatly changed. All the cases, of course, presuppose that the contract has an effect upon the transit of some goods or persons across State lines, but just what that effect must be is the point of divergence. From some expressions of the earlier cases it might be supposed that the agreement must in its terms concern the transit, or in other words that the conscious purpose of the parties must be to change movement, which would otherwise occur; but that rule is not now the law. Since perhaps *Addyston Pipe Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and certainly since *United States v. Patten*, *supra*, a case which had an unusual degree of consideration by the Supreme Court, it must be understood that the combination must be judged by the usual rule of legal responsibility; that is to say, whether the effect upon the movement of goods or persons is within those consequences which would reasonably be supposed to result from the parties' acts.

The words "direct" and "indirect" permit of some latitude, as the cases show. In nature all results are equally inevitable, and the category has no useful application; it would be arbitrary and meaningless. Only when we speak of conscious persons, necessarily ignorant of all the causes which actually operate, can the distinction become useful; and it is, of course, only in relation to persons that it is used juristically. As I have said, the rule no longer is that

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